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Religion in the Public Schools: A Proposed Constitutional Standard

The place of religion in the public schools is only one aspect of the problem of Church-State separation, but if the emotional response following last year's United States Supreme Court decision in the Regents' Prayer Case is any indication, it is an important one. In this Article, Professor Choper proposes that, for purposes of testing the constitutional validity of religious activity in the public schools, the first amendment's establishment clause is violated whenever the state engages in "solely religious activity that is likely to result in (1) compromising the student's religious or conscientious beliefs or (2) influencing the student's freedom of religious or conscientious choice." After analyzing a number of precedents, Professor Choper applies this standard to various situations that involve religious activity in the public schools; he concludes that the price of abolishing certain religious influences in the schools must be paid to protect religious liberty.

Jesse H. Choper*

Thirteen years ago, Father John Courtney Murray stated: "No one who knows a bit about the literature on separation of church and state, that for centuries has poured out in all languages, will be inclined to deny that hardly another problem in the religious or political order has received so much misconceived and deformed statement, with the result that the number of bad philosophies in the matter is, like the scriptural number of fools, infinite."¹ Perhaps Father Murray would similarly evaluate the writing that has

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1. Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23 (1949).

appeared since 1949. Whether or not one agrees with his judgment on the merits of the literature, no one would deny that the quantity of discussion is indeed overpowering. With the Supreme Court's recent decision in the *Regents' Prayer Case*,² it is inevitable that much more will be forthcoming. This term, the Court has already indicated that it will take a more active role in resolving church-state conflicts.³ Perhaps the wiser course would be to heed the warning implicit in Father Murray's comment. No doubt, many men of wisdom have declined to express themselves on this issue "so likely to generate heat rather than light."⁴ But light, in the form of principled standards to determine the constitutionality, under the first and fourteenth amendments, of the multitude of church-state problems inherent in a democracy such as ours, is sorely needed.

The constitutional standard to be developed in this article is not suggested as a solution for every type of church-state conflict. Rather, it is to be confined to a narrow but exceedingly important segment of the question. The two drives that give rise to the greatest current constitutional controversies regarding the church-state separation commanded by the first amendment, according to Mr. Justice Rutledge,⁵ involve the use of the public schools to foster religion and the procurement of public funds to support parochial schools. This article will deal only with the first area.

The proposed constitutional standard is that for problems concerning religious intrusion in the public schools, the establishment clause of the first amendment is violated when the state engages in what may be fairly characterized as *solely religious activity* that is likely to result in (1) *compromising* the student's religious or conscientious beliefs or (2) *influencing* the student's freedom of religious or conscientious choice.⁶

2. *Engel v. Vitale*, 370 U.S. 421 (1962).

3. On October 8, 1962, the Court agreed to hear argument in two cases presenting the issue of the validity of daily Bible reading in the public schools. *Schempp v. School Dist.*, 201 F. Supp. 815 (E.D. Pa.), *prob. juris. noted*, 371 U.S. 807 (1962); *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698, *cert. granted*, 371 U.S. 809 (1962).

4. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 2 (1961).

5. *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947) (dissenting opinion).

6. Use of the phrase "public schools" is meant to encompass all kindergarten, elementary, and high schools maintained under governmental authority and control. The word "state" is used to designate all that is included

I. DEVELOPMENT OF THE STANDARD

A. SOME SETTLED PROPOSITIONS

Certain preliminary issues must be disposed of at the outset. First, the Supreme Court has decisively settled that the first amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," has been made wholly applicable to the states by the fourteenth amendment.⁷ Although the history, logic, and desirability, of this thesis have been articulately questioned,⁸ the Court's consistent position renders further discussion unprofitable. Second, the Court has unequivocally rejected the proposition that the purpose of the

within the concept of state action under the fourteenth amendment. See Civil Rights Cases, 109 U.S. 3 (1883). This would cover not only the state legislature and executive, see *Virginia v. Rives*, 100 U.S. 313 (1879), but also all administrative agencies, *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), political subdivisions, *Hague v. CIO*, 307 U.S. 496 (1939), and individuals (such as school principals and teachers) acting under color of state authority. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

7. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Everson v. Board of Educ.*, 330 U.S. 1, 5 (1947); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210-11 (1948); *Zorach v. Clauson*, 343 U.S. 306, 309 (1952); *Torcaso v. Watkins*, 367 U.S. 488, 492 (1961); *Engel v. Vitale*, 370 U.S. 421, 423, 430 (1962).

The first part of the first amendment will hereinafter be referred to as the "establishment clause"; the second part, as the "free exercise clause."

8. Howe, *The Constitutional Question*, in *RELIGION AND THE FREE SOCIETY* 49 (1958). The essence of Professor Howe's position is that the language of the fourteenth amendment that "no State shall . . . deprive any person of life, liberty, or property, without due process of law" indicates that its intention was only to bar the states from infringing on those rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). By virtue of the fourteenth amendment, the states not only are forbidden to deny that liberty that is protected by the free exercise clause, but also are powerless to give any aid to religion that would significantly impair the intellectual or spiritual liberties of individuals. The establishment clause, however, may be read to bar many federal aids to religion that do not appreciably affect individual liberties—for example, the granting of tax exemptions to churches and the public schools' permitting the gift of Bibles to willingly receptive pupils. The fourteenth amendment should not be read to prohibit the states from extending these aids to religion.

In answer, it might be suggested that some of the aids to religion that Professor Howe finds to have little impact on the secured rights of individuals—for example, the distribution of Bibles in the public schools—may well have substantial impact. See text accompanying note 509 *infra*. Furthermore, even those aids to religion that have no immediate effect on individual liberty—for example, financial assistance to religion in the form of tax exemption or, for that matter, a direct appropriation to a particular church—historically and logically have tended to cause so much strife among religious sects as to ultimately endanger individual liberty. See *Everson v. Board of Educ.*, 330 U.S. 1, 11, 53-54 (1947).

establishment clause is only to forbid governmental preference of one religion over another.⁹ Despite heated (and often intemperate) argument to the contrary,¹⁰ the establishment clause bars certain governmental aids to religion even if impartially afforded to all religious sects.¹¹ Finally, the Court has firmly determined that the ban of the establishment clause extends beyond the setting up of a state church,¹² a proposition with which there has been relatively little disagreement.

B. AIMS OF THE PROPOSED STANDARD

Although it has been suggested that "it is not reason but history that must be consulted"¹³ to determine what is right and proper in the field of church-state relations, such a dichotomy neither can nor should be drawn. The precise intentions of the framers of the first amendment are surely of great importance, but scholarly investigation has produced antithetic conclusions.¹⁴ The desirable course is to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amend-

9. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 211 (1948).

10. *E.g.*, O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949); Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROB.* 3, 9-16 (1949); Murray, *supra* note 1, at 23. Disagreement with the Court's interpretation of the establishment clause is not limited to nonjudicial commentators. Recently, the Supreme Court of Florida decided that it was

not impressed with the language quoted [from four Supreme Court decisions] as being definitive of the "establishment" clause. It goes far beyond the purpose and intent of the authors and beyond any reasonable application to the practical facts of every day life in this country. We feel that the broad language quoted must, in the course of time, be further receded from, if weight is to be accorded the true purpose of the First Amendment.

Chamberlin v. Dade County Bd., 143 So. 2d 21, 24-25 (Fla. Sup. Ct. 1962). See also *id.* at 28; *Zorach v. Clauson*, 303 N.Y. 161, 179-82, 100 N.E.2d 463, 472-73 (1951) (concurring opinion); 9 *U.C.L.A.L. REV.* 495, 499 (1962).

11. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210-11 (1948); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 492-93, 495 (1961).

12. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 213 (1948) (concurring opinion); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

13. Herberg, *Religion, Democracy, and Public Education*, in *RELIGION IN AMERICA* 118, 142 (Cogley ed. 1958).

14. Compare the opinions in *Everson v. Board v. Educ.*, 330 U.S. 1 (1947), with the authorities cited in note 10 *supra*. Compare Pfeffer, *Church and State: Something Less Than Separation*, 19 *U. CHI. L. REV.* 1 (1951), with PARSONS, *THE FIRST FREEDOM* (1948). See also Kurland, *The Regents' Prayer Case: "Full of Sound and Fury Signifying . . ."*, 1962 *SUPREME COURT REV.* 1, 22-25.

ment,¹⁵ but one that is also capable of consistent application to the relevant problems.¹⁶ When applied, the principle should take into account those values now cherished in our society¹⁷ and should not produce decidedly farfetched or unacceptable results.¹⁸ The last criterion is particularly crucial in the emotionally-charged area of religion in the public schools.

The proposed constitutional standard attempts to meet these requirements. If there are any points of general agreement in the field of church-state relationships, they are that probably the paramount purpose for the enactment of the establishment clause was to safeguard freedom of worship and conscience,¹⁹ and that the protection of religious liberty remains our society's major concern in the church-state sphere.²⁰ By stressing the security of religious and conscientious scruples of public school children, the proposed standard attempts to fulfill both the predominant histori-

15. Cf. Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

16. See LLEWELLYN, *THE BRAMBLE BUSH* 43-44 (1951). But see 51 GEO. L. J. 185 (1962).

17. Cf. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-32 (1959).

18. Cf. Henkin, *supra* note 15, at 477.

19. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962) (Black, J.); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (Douglas, J.); *Everson v. Board of Educ.*, 330 U.S. 1, 8-11 (Black, J.), 53-54 (1947) (Rutledge, J., dissenting); O'NEILL, *op. cit. supra* note 10 at 96; PFEFFER, *CHURCH, STATE, AND FREEDOM* 122 (1953); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428 (1953); Kurland, *supra* note 4, at 4; Murray, *supra* note 1, at 32; 31 *FORDHAM L. REV.* 201, 202 (1962).

20. See, e.g., Butts, *The Relation Between Religion and Education*, 33 *PROGRESSIVE EDUCATION* 140, 141 (1956): "This movement [from the latter part of the 18th century to the early 20th century] toward separation of church and state in education was undertaken in order to preserve freedom for all." Johnson, *Religion and Education*, 33 *PROGRESSIVE EDUCATION* 143, 145 (1956): "[P]rotection of religious liberty is the beginning and the end of the separation of church and state." Katz, *supra* note 19, at 436, points out that "fear of the Roman Catholic church as a potential threat to religious freedom" probably explains the strict separationist position of those who oppose government aid to religion, such as financial assistance to parochial schools, that seemingly does not result in an impairment of religious liberty. On the other hand, those who attack the strict separationist position on such issues as financial aid to parochial education and public school released time do so on the ground that complete separation violates the religious liberty of those who attend parochial schools or who wish to participate in released time. See, e.g., Bishops of the United States, *The Place of the Private and Church-Related Schools in American Education*, 33 *PROGRESSIVE EDUCATION* 152 (1956); Hayes, *The Constitutional Permissibility of the Participation of Church-Related Schools in the Administration's Proposed Program of Massive Federal Aid to Education*, 11 *DEPAUL L. REV.* 161, 162 (1962); Reed, *Church-State and the Zorach Case*, 27 *NOTRE DAME LAW.* 529, 540 (1952); Slough & McAnany, *Government Aid to Church-Related Schools: An Analysis*, 11 *KAN. L. REV.* 35, 72 (1962).

cal and contemporary concerns with religious freedom. It prohibits certain governmental action that is likely to result in (1) a student's doing something that is forbidden by his conscientious beliefs, thus *compromising* his scruples or (2) a student's engaging in religious activities that, although not contrary to his religion's beliefs, he would not otherwise undertake, thus *influencing* his freedom of religious participation or choice. The results the proposed standard produces seem to me to be, for the most part, favorable; those that are not are nonetheless acceptable.

C. DELIMITATION OF THE AREA AND DEFINITION OF SOLELY RELIGIOUS ACTIVITY

Many writers have considered the problems of religious infiltration in the public schools and financial aid by government to religious schools to be subject to singular treatment.²¹ Some have concluded that the result of both is to "aid" religion, and therefore, both must be measured by the same standard.²² The contention that both "aid" religion is indisputable, but it cannot follow that "aid to religion" is *the* constitutional determinant.²³ If it were, few governmental activities could withstand constitutional attack.²⁴

21. E.g., Corwin, *Supra* note 10, at 5; Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387 (1948); Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 109, 111 (1949); Pfeffer, *The New York Regents' Prayer Case (Engel v. Vitale): Its Background, Meaning and Implications*, Committee on Law and Social Action Reports 6 (American Jewish Congress June 26, 1962). For a rather intemperate criticism of the Supreme Court's failure to so treat these questions, see Comment, 9 OHIO ST. L.J. 336, 340 (1948).

22. E.g., Boyer, *Religious Education of Public School Pupils in Wisconsin*, 1953 WIS. L. REV. 181, 240; Note, 1 J. PUB. L. 212, 216 (1952).

23. The source of the confusion is undoubtedly the famous dictum of Mr. Justice Black in *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947): "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." The dictum was repeated by the Court in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210 (1948); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); and *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961). It has been discussed in virtually all of the church-state literature since *Everson*. Curiously, Mr. Justice Black made no reference to this dictum in *Engel v. Vitale*.

24. The public fire and police protection afforded parochial schools undeniably "aid" them. The closing of public schools each Saturday and Sunday, which enables Christian and Jewish children to attend their respective churches and synagogues, clearly "aids" attendance at religious services.

The best evidence that the Court never intended the phrase "aid to religion," as commonly understood, to be *the* constitutional determinant, but rather considers "aid" to be a word of art (perhaps poorly chosen), is that in the first two decisions in which the phrase was used, the Court reached opposite conclusions despite the fact that both situations obviously resulted in "aid" to religion. *Everson v. Board of Educ.*, 330 U.S. 1 (1947)

Nor, when more objective standards are available,²⁵ is it satisfactory merely to say that the question of what kinds of "aid" are constitutional and what kinds are not "is one of degree."²⁶

Various forms of public financial assistance to parochial education are permissible under the first amendment because such assistance, despite its resultant aid to religion, has the accomplishment of a nonreligious public purpose²⁷ as an independent *primary goal*, as distinguished from a dependent *derivative goal*.²⁸ Thus, the use of tax-raised funds to pay the bus fares of parochial school pupils was upheld by the Supreme Court as "public welfare legislation" protecting "children going to and from church schools from the very real hazards of traffic."²⁹ Likewise, the argument, whatever its merit, for the constitutional inclusion of religiously affiliated schools in any federal program providing financial assistance for elementary and secondary school buildings and teachers' salaries is that such government support "confers directly and substantially a benefit to citizen education,"³⁰ and that such an end is within the legitimate scope of federal concern.³¹ Although these governmental programs aid religion, *they may not be fairly characterized as solely religious activities*. However, other practices, such as prayer recitation and Bible reading, *must be fairly characterized as solely religious activities having no independent primary nonreligious purpose*. Their exclusive primary goal is to inculcate the students with religious and spiritual ideals or to assist in such inculcation.

(upholding the use of public funds to transport children to parochial schools); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (invalidating religious instruction during released time in the public schools).

25. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), in which the Court treated the problem of what is sufficient state involvement in private action to constitute state action as a question of degree only "because readily applicable formulae may not be fashioned."

26. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (Douglas, J.).

27. See, e.g., 1 *BUFFALO L. REV.* 198, 200 (1951); 3 *RUTGERS L. REV.* 115, 119-21 (1949). The aid obtained by religion is often referred to as being merely "incidental."

28. See text accompanying notes 31-37 *infra*.

29. *Everson v. Board of Educ.*, 330 U.S. 1, 16-17 (1947).

30. National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 *GEO. L.J.* 397, 422 (1961).

31. For other instances of the use of this position, see *Opinion of the Justices*, 99 N.H. 519, 113 A.2d 114 (1955); *Schade v. Allegheny County Institution Dist.*, 386 Pa. 507, 126 A.2d 911 (1956); *Slough & McNaney*, *supra* note 20, at 62-64. See also *Cochran v. Louisiana State Bd.*, 281 U.S. 370 (1930). Evaluation of this thesis is beyond the scope of this article. Since the governmental action with which it deals may not be fairly characterized as "solely religious," it falls outside the constitutional standard proposed herein and is subject to independent consideration.

Contentions proclaiming a public purpose for these solely religious activities are numerous. It has been argued that their intention is to combat juvenile delinquency among American youth;³² to teach "tolerance, love of fellow men, kindness, responsibility for the welfare of others";³³ to prevent rape and other crimes;³⁴ and to develop "deep and intelligent convictions" in our children.³⁵ It has even been suggested that since failure to engage in these practices causes upset and disturbed community reaction, the prevention of such situations is a secular justification for having the religious exercises.³⁶

But these arguments ignore the crucial point. The results that follow from the introduction of religion into the public schools are unimportant. What is relevant is the fact that if such effects are produced, they come about only if the primary goal—the implanting of spiritual and religious beliefs—is achieved; the purported secular ends are derivative from the exclusively religious end.³⁷

Perhaps governmental aid to parochial education may be constitutionally justified on the ground that, despite the fact that aid to religion is a necessary effect, an *equally necessary effect* is the promotion of a secular goal. But to uphold the constitutionality of religious incursions into public education on the basis of their alleged secular benefits, despite the fact that they are merely derived from the *sole necessary effect* of advancing religion not only opens "the doctrinal floodgates for infinitely greater aid to religion,"³⁸ but literally reads the establishment clause out of the first amendment.³⁹ Such incursions "employ Religion as an engine of Civil policy."⁴⁰ If the instilling of moral, ethical, and spiritual values will sustain these solely religious practices,⁴¹ there

32. Brief for the Board of Regents of the University of the State of New York as Amicus Curiae, p. 14, *Engel v. Vitale*, 370 U.S. 421 (1962). See also *Gordon v. Board of Educ.*, 78 Cal. App. 2d 464, 474, 178 P.2d 488, 494 (Ct. App. 1947).

33. Sullivan, *supra* note 21, at 108.

34. W. S. Fleming, quoted in PFEFFER, *op. cit. supra* note 19, at 300-01.

35. Chairman of New York University Department of Religious Education, quoted in Boyer, *supra* note 22, at 232.

36. See Lieberman, *A General Interpretation of Separation of Church and State and Its Implications for Public Education*, 33 PROGRESSIVE EDUCATION 129, 132 (1956).

37. See *McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (Frankfurter, J., separate opinion); Note, 3 RUTGERS L. REV. 115, 121 (1949).

38. Note, 57 YALE L.J. 1114, 1120 (1948).

39. See generally Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735, 746-47 (1962).

40. Madison, *Memorial and Remonstrance Against Religious Assessments*, para. 5, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 67 (1947).

41. The argument that this is the saving "public purpose" has been made

would seem to be no reason why a government could not subsidize the church that it feels best inculcates its members with these qualities.⁴²

Nor is it a solution to judge these solely religious activities by balancing the public benefit derived against the quantum of aid extended to religion.⁴³ This test may have some value in the case of governmental action that results directly in both secular and religious benefit, but when the public benefit is derivative—when it is secured only after the religious inculcation is achieved—the secular benefit will always vary directly with the religious benefit, and any balancing is logically impossible.

The reasons calling for separate treatment of the problem of religious activities in the public schools and the problem of financial aid to parochial education are also applicable in severing the former from that presented by other governmental activity that allegedly violates the establishment clause, but has an independent primary nonreligious purpose.⁴⁴ Also, since children of elementary and high school age are far less mature and intellectually developed than the public generally,⁴⁵ since they are particularly unable to evaluate conflicting religious beliefs objectively,⁴⁶ since they are especially susceptible to being influenced in religious choice,⁴⁷ and since they are compelled by law to attend the

by Creel, *Is It Legal for the Public Schools of Alabama to Provide an Elective Course in Non-Sectarian Bible Instruction*, 10 ALA. LAW. 86, 95 (1949); Harpster, *Religion, Education and the Law*, 36 MARQ. L. REV. 24, 47 (1952); Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROB. 61, 67 (1949). See also *Hart v. School Dist.*, 2 LANCASTER L. REV. 346, 352 (Pa. C.P. 1885). The writer in 30 FORDHAM L. REV. 509 (1962), asserts: "It would seem quite arbitrary for the Supreme Court to hold that a general day of rest and relaxation served a public purpose but the acknowledgement of a God by people 'whose institutions presuppose a Supreme Being' was not a public purpose."

42. Professor Kauper suggests this result, although somewhat more cautiously: "Moreover, the notion that government can directly aid religion in order to bolster morale suggests implications of a wider use of public moneys in direct aid of religion." Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 837 (1954). See also *Pfeiffer v. Board of Educ.*, 118 MICH. 560, 578, 77 N.W. 250, 257 (1898) (dissenting opinion).

43. See Note, 17 GEO. WASH. L. REV. 516, 529 (1949); 57 YALE L.J. 1114, 1120-21 (1948).

44. E.g. Sunday closing laws (see *McGowan v. Maryland*, 366 U.S. 420 (1961)); appropriations to hospital, maintained under religious auspices, for treating indigent patients (see *Bradfield v. Roberts*, 175 U.S. 291 (1899)).

45. Cf. PFEFFER, *op. cit. supra* note 19, at 423; Cosway & Toepfer, *Religion and the Schools*, 17 U. CINC. L. REV. 117, 137 (1948); Comment, 22 U. CHI. L. REV. 888, 893 (1955). Possible distinctions between elementary school children and high school pupils will be discussed *infra*.

46. Cf. 16 GEO. WASH. L. REV. 556, 559 (1948).

47. Cf. 25 CAL. OPS. ATT'Y GEN. 324 (1955); Cushman, *The Holy*

site of these religious practices,⁴⁸ there is a sound basis for giving distinctive treatment to solely religious practices in the public schools instead of treating them together with similar practices existing in our society generally.⁴⁹

D. THE REGENTS' PRAYER CASE

In 1951, the New York State Board of Regents, the governmental agency that supervises the state's public school system, composed and recommended to all local school boards the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."⁵⁰ In 1958, the New Hyde Park Board of Education instructed all teachers that the prayer be recited aloud by each class at the beginning of every school day. An action in the state courts was instituted by parents of attending students, who were Jewish, Ethical Culturists, Unitarians, or non-believers,⁵¹ asserting, *inter alia*, that the practice should cease because it violated the establishment clause.⁵² Their claims were rejected at all state levels,⁵³ although it was made clear that objecting students had the right not to participate.⁵⁴ The Supreme Court reversed in *Engel v. Vitale*,⁵⁵ holding the practice to be contrary to the establishment clause, a ruling that "aroused more public controversy than any decision since *Brown v. Board of Education*."⁵⁶

Bible and the Public Schools, 40 CORNELL L.Q. 475, 496 (1955); Kalven, *A Commemorative Case Note*, 27 U. CHI. L. REV. 505, 518 (1960); 74 HARV. L. REV. 611, 614 (1961).

48. Cf. Sutherland, *Public Authority and Religious Education: A Brief Survey of Constitutional and Legal Limits*, in *THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL* 45 (Brown ed. 1958).

49. Such practices include chaplains in both houses of Congress and in state legislative assemblies and the opening prayer in the United States Supreme Court: "God save the United States and this Honorable Court."

50. Its use was recommended at the commencement of each school day in conjunction with the pledge of allegiance to the flag. Record, p. 28, *Engel v. Vitale*, 370 U.S. 421 (1962).

51. *Id.* at 12.

52. Other claims presented were that the free exercise clause was violated, that a similar clause of the state constitution, N.Y. CONST. art. I, § 3, was violated, and that the Board of Education had exceeded its statutory power. *Id.* at 16-17.

53. *Engel v. Vitale*, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959), *aff'd*, 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (1960), *aff'd* 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961) (Dye, J., & Fuld, J. dissenting).

54. 18 Misc. 2d 659, 696, 191 N.Y.S.2d 453, 492-93 (1959).

55. 370 U.S. 421, 424 (1962).

56. 31 U.S.L. WEEK 1038 (1962). The decision was announced on June 25, 1962. Reference to any newspaper or periodical of the time will bear out

At the outset, Mr. Justice Black, writing for the Court,⁵⁷ characterized the recitation of the Regents' prayer as "a religious activity."⁵⁸ That it was a solely religious activity, having no independent primary nonreligious purpose, is beyond dispute.⁵⁹ Examination of the remainder of the opinion, however, leaves somewhat unclear the precise basis and extent of the decision. There is language indicating that the decision holds no more than that the evil in the situation was the fact that a governmental agency had taken it upon itself to *compose* an official prayer for use in the public schools.⁶⁰

the Law Week characterization. Many, if not most of the attacks on the case were emotionally oriented and were founded on a basic misunderstanding (unintentional or otherwise) of the decision. Those who found it politically expedient to denounce the "ruling against God" did so, without pausing to learn whether the Court so ruled. Long-time critics of the Court exploited the opportunity to heap further abuse, without regard to the limitations stated in the reasoning and language of the case. For a discussion of this criticism, see Choper, *What Did Court Really Rule on Prayer*, Minneapolis Star, Sept. 15, 1962, p. 6A, col. 5. See generally Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, in 1962 SUPREME COURT REV. 1; Pfeffer, *supra* note 39.

57. He was joined by Mr. Chief Justice Warren and Justices Clark, Harlan, and Brennan. Mr. Justice Douglas wrote a concurring opinion. Mr. Justice Stewart dissented. For discussion of these last two opinions, see notes 188-89 *infra*. Neither Mr. Justice Frankfurter nor Mr. Justice White participated, the former being ill when the decision was announced and the latter not yet having been appointed when the case was argued.

58. 370 U.S. at 424. The fact that the prayer recitation immediately followed the salute to the flag was not even considered as changing the characterization of the nature of the activity. Record, p. 13, Engel v. Vitale, 370 U.S. at 421. In this connection, see Schempp v. School Dist., 177 F. Supp. 398, 406 (E.D. Pa. 1959). However, the Court's opinion later pointed out that this was an "*unquestioned* religious exercise" (emphasis added) and distinguished this case from "patriotic or ceremonial occasions" such as "singing officially espoused anthems which include the composer's professions of faith in a Supreme Being." 370 U.S. at 435, n.21. Although it appears that this refers only to "The Star-Spangled Banner," the third stanza of which contains references to the Deity, it seems that the Court may be willing to single out those parts of a daily school exercise that are of a religious nature yet unwilling to sever those verses of a song that are solely religious. See text accompanying notes 541-44 *infra*.

59. This was acknowledged in The Regents Statement on Moral and Spiritual Training in the Schools, Record, pp. 28-29, Engel v. Vitale, 370 U.S. 421 (1962).

60.

The petitioners contend . . . that the . . . prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by government officials as a part of a governmental program to further religious beliefs. . . . We agree with that contention since we think that the [establishment clause] must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

370 U.S. at 425.

Even if the Court's holding is this limited, it does not augur well for the closely related public school practices of reading the Bible and reciting other long-established prayers.⁶¹ It can be argued that since the Bible and such prayers as the Lord's Prayer were not *composed* by any governmental agency, they do not fall into the same category as the Regents' prayer,⁶² but there seems to be no reason to distinguish between a governmental agency *composing* a religious prayer for use in the schools and that same agency *selecting* a prayer or other religious material composed elsewhere.⁶³ If anything, the Regents' prayer, which has been described by some as "purely nondenominational,"⁶⁴ would be much less objectionable in our religiously pluralistic society than any version of the Bible or the Lord's Prayer, none of which are unobjectionable to all of the major religious faiths.⁶⁵ Nor would the circumstances be improved if, instead of the Regents selecting or

61. Pfeffer, Committee on Law and Social Action Reports, *supra* note 21, at 5-6, says that it follows from *Engel* that the Lord's Prayer and Bible reading are likewise unconstitutional.

62. See Lewis, *School-Prayer Issue in High Court Again*, N.Y. Times, Oct. 14, 1962, § 4, p. 5, col. 2.

63. It is difficult to believe that the decision in *Engel* would have been different if, instead of the Regents having composed the words of this prayer, they had selected them from a collection of prayers composed by someone else. The opinion laid great emphasis on the bitter controversy in 16th and 17th century England over the governmentally approved Book of Common Prayer. 370 U.S. at 425-27, 429-30. The source of that struggle was the question of what the content of the Book of Common Prayer should be. Surely, it made no difference in that controversy whether the government *composed* prayers that reflected the sentiments of a particular religion or selected prayers already composed of the same kind. See Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 38 n.36 (1962).

There is language in the opinion to support the conclusion that this distinction should not be drawn.

[O]ne of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer. . . . [N]either the power nor the prestige of the . . . Government [shall] be used to control, support or influence the kinds of prayer the American people can say. . . .

[G]overnment . . . is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity. . . .

[E]ach separate government in this country should stay out of the business of writing or sanctioning official prayers. . . .

370 U.S. at 429, 430, 435. See 31 FORDHAM L. REV. 203 n.20 (1962).

64. 9 U.C.L.A.L. REV. 499 (1962). See also *Engel v. Vitale*, 370 U.S. 421, 430 (1962). But see text accompanying notes 66-74 *infra*.

65. See text accompanying notes 258-81, 230-36 *infra*.

composing the prayer, either the teacher or the students made the choice. Indeed, since these people would be much further removed from the pressures of the political process than the Regents, the product of such selection or composition would much more likely be oriented toward the teachings of a particular religious sect.⁶⁶

Certain other observations may be made from an examination of the Court's opinion. The question of whether the prayer was denominationally neutral⁶⁷ was sidestepped by the Court.⁶⁸ The answer is manifest. Since it involved a supplication to God, it patently favored the theistic religions over those that are nontheistic, such as Ethical Culture (the religion of one of the complaining parents).⁶⁹ The conceded "purpose and effect"⁷⁰ of this program was "teaching our children . . . that Almighty God is their Creator, and that by Him they have been endowed with their inalienable rights"⁷¹ Opposition was expressed even among those religions teaching belief in a Supreme Being; some complained that the prayer was ineffectual, while others found it plainly contrary to their religious beliefs.⁷² Furthermore, theistic religions differ on the propriety of offering prayers not specifically decreed by the sect and of seeking divine assistance in certain matters.⁷³

66. Cf. *Engel v. Vitale*, 18 Misc. 2d 659, 699, 191 N.Y.S.2d 453, 495 (1959).

67. Judge Froessel in the New York Court of Appeals found it to be so. *Engel v. Vitale*, 10 N.Y.2d 174, 183, 176 N.E.2d 579, 583 (1961) (concurring opinion).

68. 370 U.S. at 430.

69. Other nontheistic religions in this country are Buddhism, Taoism, and Secular Humanism. See authorities cited in *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

70. *McGowan v. Maryland*, 366 U.S. 420, 443, 445, 449 (1961). See also *id.* at 453.

71. The Regents Statement on Moral and Spiritual Training in the Schools, Record, p. 28, *Engel v. Vitale*, 370 U.S. 421 (1962).

72. Although the Catholic Church and most Protestant groups warmly endorsed the prayer,

The Christian Century deemed [it] 'likely to deteriorate quickly into an empty formality with little, if any, spiritual significance.' The leaders of the Lutheran Church of Our Redeemer in Peekskill [N.Y.] charged that Christ's name had 'deliberately been omitted to mollify non-Christian elements,' and that the prayer 'therefore is a denial of Christ and His prescription for a proper prayer. As such it is not a prayer but an abomination and a blasphemy.'

PFEFFER, CHURCH, STATE, AND FREEDOM 396 (1953). Opposition was also expressed by the Schenectady (N.Y.) Methodist Church Board, the Liberal Ministers Club (primarily Unitarians and Universalists), and "every important interested Jewish organization in the state." *Ibid.*

73. See the authorities cited in Brief for American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae, p. 20 n.6, *Engel v. Vitale*, 370 U.S. 421 (1962). See also Brief for Synagogue

Thus, the Court could have easily reached its result by use of the generally noncontroversial proposition that the establishment clause forbids governmental preference of some religions over others.⁷⁴ However, since the Court had based a decision just one year before on the thesis that a state cannot "constitutionally pass laws or impose requirements which aid all religions as against nonbelievers,"⁷⁵ it would be hypercritical to say that, on this ground, the *Engel* holding is too broad.

The holding may be criticized as too broad on another ground, however. A major defense for the constitutionality of the Regents' prayer was the fact that participation in its recitation was wholly voluntary;⁷⁶ objecting students were privileged either to remain silent or to be excused from the room.⁷⁷ The Court's opinion found "the fact that its observance on the part of the students is voluntary" to be irrelevant.⁷⁸ Although recognizing that "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain,"⁷⁹ Mr. Justice Black stated that "the Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."⁸⁰ The essence of this position seems to have emanated from the argument by two amici curiae in the case—one finding an establishment clause violation, irrespective of the privilege of nonparticipation, anytime government is engaged in "undertaking or sponsoring religious programs";⁸¹ the other, whenever there is state "participation in religious affairs."⁸² This seemingly

Council of America and National Community Relations Advisory Council as Amici Curiae, p. 10, *Engel v. Vitale*, 370 U.S. 421 (1962).

74. See text accompanying notes 9-11 *supra*.

75. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). See also authorities cited in note 11 *supra*.

76. Brief for Respondents, pp. 32-34; Brief for Intervenors-Respondents, pp. 11, 42-43; Brief for The Board of Regents of the University of the State of New York as Amicus Curiae, p. 24, *Engel v. Vitale*, 370 U.S. 421 (1962).

77. 370 U.S. at 430.

78. *Ibid.*

79. *Id.* at 431.

80. *Id.* at 430. (Emphasis added.)

81. Brief for American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae, p. 17, *Engel v. Vitale*, 370 U.S. 421 (1962).

82. Brief for Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae, p. 15 (Mr. Leo Pfeffer, Attorney), *Engel v. Vitale*, 370 U.S. 421 (1962).

broad interpretation of the establishment clause was not necessary to the decision in *Engel*.⁸³ The case could have been more discretely decided specifically on the ground that, regardless of the dissenting student's right of nonparticipation, compulsion did exist;⁸⁴ that a showing of actual compulsion was unnecessary because of the "indirect coercive pressure" that this program exerted; that the program would result either in the young children⁸⁵ of the minority groups involved taking part in a religious exercise that was contrary to their conscientious beliefs or in their being singled out as "oddballs" by their peers; that this is a cruel choice that no state may constitutionally demand if it engages in a solely religious activity.⁸⁶

II. SUPPORT FOR THE STANDARD

A. INDIRECT COERCION

Although the Supreme Court has never explicitly held that indirect coercive pressure constitutes a violation of the establishment clause,⁸⁷ there is a plethora of material to support this rationale.

1. *Existence of Indirect Coercion*

It is universally recognized that such pressures in fact exist. Many writers of widely diverse backgrounds⁸⁸ have observed that young people of minority religious groups are extremely sensitive about conspicuously absenting themselves from religious exercises conducted by the majority and that there is a powerful, albeit subtle, pressure to conform. The emotional strain is very frequently so great that it results in unwilling participation in preference to some amount of social ostracism. Student commentators

83. See text accompanying notes 189-92 *infra*.

84. But see Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 39 (1962).

85. The parents bringing this suit had a total of ten children attending school. The ages of the children ranged from seven to 15. Record, pp. 11-12, *Engel v. Vitale*, 370 U.S. 421 (1962).

86. Cf. *Braunfeld v. Brown*, 366 U.S. 599, 616 (1961) (Stewart J., dissenting).

87. This is pointed out in 9 U.C.L.A.L. REV. 500 n.25 (1962).

88. These include Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 495 (1955) (professor of government); Levy, *Views from the Wall - Reflections on Church-State Relationships*, 29 HENNEPIN LAW. 51, 55 (1961) (professor of law); Harpster, *Religion, Education and the Law*, 36 MARQ. L. REV. 24, 42 (1952), and Vishny, *The Constitution and Religion in the Public Schools*, Decalogue J., June-July 1960, pp. 4, 5-6; (practicing attorneys); Lewis, *School-Prayer Issue in High Court Again*, N.Y. Times, Oct. 14, 1962, § E, p. 5, col. 1 (newspaper columnist).

have made the same judgment.⁸⁹ A recent opinion by the Attorney General of California stated that "children forced by conscience to leave the room during such exercises would be placed in a position inferior to that of students adhering to the State-endorsed religion."⁹⁰

Social psychologists and sociologists have pointed out that children place great importance on how they are esteemed by their classmates.⁹¹ The urge to conform to their classmates' attitudes is peculiarly strong,⁹² and "the fear of being accused by the others of wanting to be 'different' " and the "very strong need to remain a member of one's group"⁹³ are carried so far as to cause these children to do and say things in accordance with the majority that they are convinced are wrong, even with reference to simple perceptual materials.⁹⁴ This is particularly prevalent "where the situation is ambiguous and not very clear-cut."⁹⁵ The option either to participate in the majority's religious worship or "to suffer the pain of psychic loneliness"⁹⁶ has been recently described by Dr. Robert Bierstedt as forcing these immature students "to choose between equally intolerable alternatives."⁹⁷ Even religious educators have warned "that so-called voluntary exemption [from religious observances] does not overcome the compulsion exerted by majority behavior."⁹⁸

The insight is not new. As long ago as 1890, state appellate court judges recognized the fact that a nonparticipant in a reli-

89. *E.g.*, 11 AM. U.L. REV. 91 (1962); 28 BROOKLYN L. REV. 146 (1961).

90. 25 CAL. OPS. ATT'Y GEN. 316, 319 (1955).

91. BOSSARD, *THE SOCIOLOGY OF CHILD DEVELOPMENT* 462 (1948).

92. MURPHY & MURPHY, *EXPERIMENTAL SOCIAL PSYCHOLOGY* 511-16 (1931). See also Cushman, *The Holy Bible and the Public Schools*, *supra* note 88, at 495: "A number of psychologists, backed by parents . . . point out the tremendous strength of the pressure to conform."

93. BERENDA, *THE INFLUENCE OF THE GROUP ON THE JUDGMENTS OF CHILDREN* 30 (1950).

94. *Id.* at 16-33.

95. *Id.* at 32.

96. Address by Professor Robert Bierstedt, *The Use of Public Schools for Religious Purposes*, ACLU Biennial Conference, June 22, 1962, p. 10. Dr. Bierstedt is Chairman of the Department of Sociology and Anthropology at the New York University Graduate School of Arts and Sciences.

97. *Ibid.*

98. Committee on Religion and Public Education of the National Council of the Churches of Christ, *Relation of Religion to Public Education—A Study Document*, INTERNATIONAL J. OF RELIGIOUS EDUCATION, April 1960, pp. 21, 29. See also Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 39 (1949): "Thousand of educators of all religious convictions are increasingly agreed that the atmosphere of public schools is *not* free from pressures."

gious exercise "loses caste with his fellows."⁹⁹ Lower federal court judges have also made this observation.¹⁰⁰ Four Justices of the Supreme Court subscribed to this theory when they stated: "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children."¹⁰¹

The fact that these public school religious practices are inherently compulsive may be empirically demonstrated by examining actual situations in some of the litigated cases. Terry McCollum, whose mother, an ardent atheist, successfully challenged a program of released time religious classes on public school premises in Champaign, Illinois,¹⁰² exercised his right of nonparticipation during the first semester of his fourth grade, but the next semester he did attend religious classes. The following year, he changed schools. In the first semester of his fifth grade, he and only one other pupil declined to attend religious classes; during the second semester, the other boy capitulated.¹⁰³ In Terry's school, "children of some thirty-one sects, including Catholic, Jewish, and Protestant, as well as many children without any particular religious preference,"¹⁰⁴ voluntarily attended a course teaching the tenets of Protestantism. Donna Schempp's father, a member of the Unitarian faith, challenged Bible reading in the Abington Township, Pennsylvania, public schools as contrary to his family's re-

99. *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 200, 44 N.W. 967, 975 (1890). In *North v. Board of Trustees*, 137 Ill. 296, 304, 27 N.E. 54, 56 (1891), the court observed that it was well-known that public schools conduct religious exercises "and that, with rare exceptions, those attending them yield cheerful obedience thereto, regardless of their personal views on the subject of religion." See also *Wilkerson v. City of Rome*, 152 Ga. 762, 786, 110 S.E. 895, 906 (1922) (dissenting opinion); *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 351, 92 N.E. 251, 256 (1910); *Knowlton v. Baumhover*, 182 Iowa 691, 699-700, 166 N.W. 202, 205 (1918); *Herold v. Parish Bd. of School Directors*, 136 La. 1034, 1050, 68 So. 116, 121 (1915); *Kaplan v. Independent School Dist.*, 171 Minn. 142, 155-56, 214 N.W. 18, 23 (1927) (dissenting opinion); *Engel v. Vitale*, 10 N.Y.2d 174, 190, 176 N.E.2d 579, 587 (1961) (dissenting opinion).

100. *Schempp v. School Dist.*, 177 F. Supp. 398, 406 (E.D. Pa. 1959).

101. Opinion of Mr. Justice Frankfurter, in which Justices Jackson, Rutledge, and Burton joined, in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948).

102. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

103. See *People ex rel. McCollum v. Board of Educ.*, 396 Ill. 14, 17, 71 N.E.2d 161, 162 (1947).

104. Record, p. 65, *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

ligious beliefs.¹⁰⁵ Donna had never voiced her objections to school authorities and, on occasion, even volunteered to read the Bible herself.¹⁰⁶ In Southern elementary schools, there are established periods of Christian Bible study; Jewish children have the option of leaving the room, but "some believe that it is better to remain seated than to have forty-three children watch one or two others shuffle out."¹⁰⁷

2. *The Defenses of Indirect Coercion*

Although there are a few instances of disagreement with the proposition that subtle coercion inheres in these situations,¹⁰⁸ most writers and state judges,¹⁰⁹ unwilling to find a constitutional violation, argue that "these pressures to conform are part of the normal social pattern and part of the price of being a religious nonconformist is the social stigma which all nonconformists have to bear"¹¹⁰ and that it "is perhaps not a major hardship and is a sacrifice which a minority might well make to a majority."¹¹¹ Some argue that "if the State is going to undertake to protect the child at one point, there seems to be no logical reason for its stopping there—it should protect the child from such mental and

105. *Schempp v. School Dist.*, 177 F. Supp. 398 (E.D. Pa. 1959).

106. *Id.* at 400. "Indeed the lack of protest may itself attest to the success and the subtlety of the compulsion." *Id.* at 407.

107. Harry L. Golden, quoted in PFEFFER, CHURCH, STATE, AND FREEDOM 304 (1953). "The Christian children wonder why one or two of their number 'do not want to hear about God,' and the Jewish child is also heartsick as well as bewildered." *Ibid.*

108. *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 293, 255 Pac. 610, 618 (1927): "The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations, but never one for neglecting them or absenting himself from them." For a singularly acrid and sarcastic (although neither very confident nor persuasive) rejection of the fact, see *Chamberlin v. Dade County Bd. of Public Instruction*, 143 So. 2d 21, 31-33 (Fla. 1962). The suggestion has been made that non-believing children may simply remain silent when religious invocations are being delivered by all of the others and thereby avoid the appearance of "non-conformity." *Lewis v. Allen*, 5 Misc. 2d 68, 74, 159 N.Y.S.2d 807, 813 (Sup. Ct. 1957). See also 9 U.C.L.A.L. REV. 499-500 (1962). Such advice is extremely naive; remaining silent conspicuously indicates the nonparticipant's status.

109. See *Murray v. Curlett*, 228 Md. 239, —, 179 A.2d 698, 704 (1962); *Engel v. Vitale*, 11 App. Div. 2d 340, 349, 206 N.Y.S.2d 183, 191-92 (1960) (separate opinion); *Engel v. Vitale*, 18 Misc. 2d 659, 695-96, 191 N.Y.S.2d 453, 491-92 (1959).

110. Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 495 (1955).

111. Sutherland, *Public Authority and Religious Education: A Brief Survey of Constitutional and Legal Limits*, in THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL 33, 51 (Brown ed. 1958). See also Note, 49 COLUM. L. REV. 836, 843-44 (1949).

emotional abuse in all circumstances. But this is totally impossible."¹¹² The progenitor of this reasoning is the dictum of Mr. Justice Jackson that "it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress."¹¹³

One need not quarrel with the unfortunate truism that it is probably inherent in our society that aberrant religionists and non-believers will be subjected to some scorn and derision. Because of this, societal pressures will be brought to bear on religious non-conformists to forsake their beliefs. As long as these societal pressures are initiated by "private action," the Constitution affords no self-executing relief. But when the state or federal government adopts a solely religious program—whose only immediate effect is the promotion of religion and in which benefit to religion is a condition precedent to any possible public benefit—it has approached the brink of its constitutional power. Some would seem to contend that such governmental activity of itself crosses the first amendment's boundary of church-state separation.¹¹⁴ However, the proposed standard only requires that when this governmental activity unavoidably results in pressures on the immature to abandon their conscientious scruples, or in the influencing of free religious choice, the establishment clause should be deemed violated. It should not be the function of a governmental program to increase "the price of being a religious nonconformist"¹¹⁵ when

112. Harpster, *Religion, Education and the Law*, 36 MARQ. L. REV. 24, 48 (1952).

113. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 233 (1948) (concurring opinion). Mr. Justice Jackson spoke only for himself. It is difficult to reconcile this statement with Justice Jackson's subscription to Mr. Justice Frankfurter's *McCollum* opinion that takes the opposite stand. See text accompanying note 101 *supra*. See also the statement by Mr. Justice Reed that "one can hardly speak of that embarrassment as a prohibition against the free exercise of religion." 333 U.S. at 241. For discussion of the free exercise issue see note 126 *infra*.

It should be made clear that it is not merely "embarrassment" that results in the situations under discussion. To define the problem with that term "tends to assume that a child of tender years has the necessary courage of his convictions—or perhaps more accurately in this situation, the courage of his parents' convictions—to withstand with emotional impunity some very real pressures to conform to group standards and to avoid being marked by his fellows as an 'outsider.'" 11 AM. U.L. REV. 93 (1962).

114. See text accompanying notes 78–82 *supra*.

115. Cushman, *supra* note 110, at 495. Cf. Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 246 (1962), who argues that because an indigent crim-

the only immediate results of the program, if any results are forthcoming at all, are aids to religion. Majority will should not be permitted to impose minority sacrifices when that will is expressed through solely religious governmental action in an area afforded specific protection by the first amendment. Neither unorthodox behavior nor dress fits that category; logical distinctions may be drawn. The contrary position amounts to "no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."¹¹⁶

It is not being suggested that, *in vacuo*, the state is obligated to undertake to protect children of religious minorities, or children of the religious majority who have marginal convictions, from the embarrassment and concomitant pressures that nonconformity brings. The Constitution does not demand that the result of every state activity be free from such effects. Solely religious programs should not be confused, as they have been,¹¹⁷ with those instances in which the state's program has the accomplishment of a secular purpose as its immediate goal.

The *Flag Salute Case*¹¹⁸ illustrates this distinction. The Supreme Court held that a state could not compel the pledge of allegiance and salute to the flag by public school children who objected because of religious conviction. The result was that objecting children were excused from participation. Since the daily program of saluting the flag continued, there is no doubt that those who conscientiously objected were faced with precisely the same type dilemma as the children whose beliefs precluded participation

inal defendant suffers many handicaps that courts are powerless to eliminate is hardly an excuse for enlarging them or perpetuating others.

116. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting).

117. See Brief for Intervenor-Respondents, pp. 45-47, 51, *Engel v. Vitale*, 370 U.S. 421 (1962); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 8 n.25 (1949). *But cf.* Brief for Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae, pp. 16-19, *Engel v. Vitale*, *supra*.

118. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Complainants in the case were Jehovah's Witnesses. Their religious beliefs included a literal version of *Exodus*, 20: 4-5, which says, "Thou shalt not make unto thee any graven image . . . : Thou shalt not bow down thyself to them, nor serve them." They considered the flag as an "image" within this command.

Although the Court stated that the case did not "turn on one's possession of particular religious views or the sincerity with which they are held," 319 U.S. at 634, and found that the state was generally without power to compel *anyone* to salute the flag, *id.* at 642, the case has been often considered, because of its facts, as presenting a free exercise of religion issue. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

in the recitation of the Regents' prayer. School children whose religious scruples forbid them from taking part in military training¹¹⁹ or from attending classes in physical education,¹²⁰ social dancing,¹²¹ or hygiene,¹²² suffer similar difficulties. However, since the requirement of pledging allegiance to the flag is imposed to promote patriotism,¹²³ and since military training and physical education, dancing, and hygiene classes are placed in the public school curriculum to further national and educational goals, these activities of the state must be fairly characterized as secular. In no way do they promote religion, nor do they rely on religious inculcation for their attainment. Such activities, on their face, are unquestionably within the scope of state power. Some children's religious objections to participating in these secular activities may entitle them to be excused on the ground of protecting the free exercise of their religion,¹²⁴ but since the state's program is secular, dissenters cannot require the state to abandon it altogether because its continued operation inherently coerces them to join. *This* is the price the deviator must pay. To hold otherwise would indeed be minority oppression of the majority. It is only when the state engages in a solely religious activity that it should bear the full responsibility for the infringements on freedom of religious choice that such a program brings about.¹²⁵ It is un-

119. *Cf.* *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934).

120. *Cf.* IOWA CODE § 280.14 (1962).

121. *Cf.* *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 Pac. 49 (Dist. Ct. App. 1921).

122. *Cf.* ALASKA COMP. LAWS ANN. § 37-7-12 (Supp. 1958); 1 FLA. STAT. § 231.09 (1) (1959); N.Y. EDUC. LAW § 3204 (5); PA. STAT. ANN. tit. 24, § 14-1419 (1962).

123. See 11 AM. U.L. REV. 91, 93 (1962).

124. The question of whether and when the free exercise clause is violated by the compelling of participation in secular activities irrespective of the fact that such participation is forbidden by one's religion is beyond the scope of this article. The issue is one that the Supreme Court appears not yet to have resolved. See *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

125. Professor Kauper rejects this analysis. He agrees that it would be unconstitutional if actual pressure were exerted on any student to take part in the solely religious activity of released time. See text accompanying notes 467-72 *infra*.

But a proper sense of concern for the non-participant does not require rejection of the program on constitutional grounds. A Jehovah's Witness child may not be required to take part in a public school flag salute exercise. He is permitted to abstain. But the public school is not required in deference to his religious convictions to abandon the flag salute exercise even though it carries religious connotations for persons in this category and may, therefore, in this sense be characterized as a religious exercise. Similarly it should be possible to retain a released time program . . . while doing justice to the non-participants.

necessary to determine whether such infringements result in a violation of the free exercise clause.¹²⁶ If the activity is both solely religious and inherently compulsive, it should be found to be a violation of the establishment clause.

B. SUPPORT FROM THE SUPREME COURT

1. *The McCollum Case*

As already mentioned, there is no Supreme Court decision that articulates this rationale as its basis. However, examination of the *McCollum* case¹²⁷ lends strong support. In that case, the board of education permitted teachers employed by private religious groups to hold weekly religious classes in the public school buildings during regular school hours.¹²⁸ The classes were attended by those students whose parents signed cards requesting their permission, and nonparticipants were required to continue their public school studies in other classrooms. The parent of a nonparticipant challenged this program under the establishment clause and was sustained by the Supreme Court.

Some writers have interpreted *McCollum* to stand for the proposition that any use of public property for religious purposes is forbidden.¹²⁹ The Court's subsequent decision in the *New York*

Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 842 (1954). (Footnotes omitted.)

The difficulty with this approach is the characterization of the flag salute as a "religious exercise," thus putting it in the same category as the Regents' prayer. The two activities are intrinsically different. One furthers religion if it does anything; the other in no way advances any religious cause. To say that any governmental activity that offends some religion is a "religious exercise" would mean that a declaration of war could be so characterized. Cf. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934).

126. It may well be argued that even though these indirect pressures, which accrue when the privilege of nonparticipation is granted, do not result in a breach of the free exercise clause when the state's activity is secular, free exercise is violated when the state action is solely religious. This would certainly be true if the outcome of free exercise problems "depends upon the balancing of the secular needs of the community against the religious rights of the individual . . ." Brief for Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae, p. 17, *Engel v. Vitale*, 370 U.S. 421 (1962).

127. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

128. Originally, classes had been conducted by Protestant teachers, Catholic priests, and a Jewish rabbi. During the final few years, the Jewish classes had been discontinued. The classes were held for 30 minutes in the lower grades and for 45 minutes in the upper grades. *Id.* at 207-09.

129. E.g., Cosway & Toepfer, *Religion and the Schools*, 17 U. CINC. L. REV. 117, 132-33 (1948); Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 352 (1950); 25 ALBANY L. REV. 318, 319 (1961).

*Released Time Case*¹³⁰ furnishes credence to this analysis. If this reading is accurate, the Court's decision in *Engel* was predetermined by *McCullum* irrespective of the question of inherent compulsion since the Regents' prayer was concededly a religious exercise being conducted on school property. In fact, the Regents' prayer arguably made greater use of public "property" than the released time program since, in the former case, the teachers conducting the religious exercise were publicly employed.¹³¹ But such a reading of *McCullum* must be rejected. In the *Engel* opinion, *McCullum* was not even cited. Although the Court at several points in its *McCullum* opinion did refer to the fact that tax-supported property was being used for the dissemination of religious doctrines,¹³² each time it did so it was careful to couple this fact with a reference to the fact that the public school machinery was being used to foster attendance at religious classes.¹³³ Furthermore, on several occasions the Court has held that the equal protection clause forbids discriminatory treatment in permitting the use of public parks by religious organizations for religious purposes,¹³⁴ thus implying that such use of public property is not constitutionally barred.¹³⁵ Indeed, at least one commentator has argued that to deny religious organizations the use of public property while permitting its use by other agencies in the community would itself violate the religion clauses of the first amendment.¹³⁶

Even when religious organizations have made the only nonpublic use of public property (which appears to have been the case in *McCullum*), such use has been sustained by state courts when it did not result in any measurable cost to the taxpayers.¹³⁷ In

130. *Zorach v. Clauson*, 343 U.S. 306 (1952).

131. Brief for Petitioner, pp. 24-25, *Engel v. Vitale*, 370 U.S. 421 (1962); Brief for American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae, p. 13, *Engel v. Vitale*, *supra*. But see note 146 *infra* for evidence of the more extensive use of the public school building in *McCullum*.

132. 333 U.S. at 209, 212.

133. The author of the *McCullum* opinion, Mr. Justice Black, made clear that it was at least *his* intention that the "decision would have been the same if the religious classes had not been held in the school buildings." *Zorach v. Clauson*, 343 U.S. 306, 316 (1952) (dissenting opinion).

134. *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

135. See Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 836 (1954); Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 108-09 (1949); Note, 57 YALE L.J. 1114, 1117-18 (1948).

136. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 60 (1961).

137. *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959) (temporary use of public school buildings by several

his excellent book, Leo Pfeffer contends that the principle of *de minimis non curat lex*¹³⁸ has no application when either the establishment clause or the free exercise clause is concerned; "the right sought to be vindicated is a religious right, not an economic one, and it is therefore inappropriate to measure it in economic terms."¹³⁹ The Supreme Court, some time ago, indicated its rejection of the *de minimis* maxim in regard to first amendment freedoms.¹⁴⁰ But when governmental activity, even that fairly characterized as "solely religious," does not infringe on religious liberty, either by violating the free exercise clause or by compromising or influencing the freedom of conscientious choice in a manner that arguably does not violate the free exercise clause,¹⁴¹ the financial expenditure involved must be subject to measurement by the *de minimis* standard. Otherwise, the appearance of "In God We Trust" on our coins would be unconstitutional. Even Pfeffer has found this to be "insignificant almost to the point of being trivial,"¹⁴² thus impliedly invoking the *de minimis* principle. Examination of his analysis reveals that Pfeffer was concerned solely with those religious programs by government that tend to compromise one's religious beliefs. Likewise, the Supreme Court dictum was concerned with the protection of *liberty*. Other recognized authorities have suggested that there must be a place for the *de minimis* doctrine in this area.¹⁴³ State courts have specifically accepted its existence,¹⁴⁴ and the *Engel* case need not be read to

churches for Sunday religious meetings); *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 160 (1879) (occasional use of school houses by different church organizations for religious services); *State ex rel. Gilbert v. Dille*, 95 Neb. 527, 145 N.W. 999 (1914) (occasional use of school building for Sunday school and religious meetings). *But see* *Hysong v. Gallitzin Borough School Dist.*, 164 Pa. 629, 30 Atl. 482 (1894) (use of public school rooms immediately after regular school hours for Catholic religious instruction to those students of the school who were Catholic by Catholic sisters who were also public school teachers).

It might be suggested that in this final case, unlike the other three, the facts created an atmosphere that resulted in pressures on both Catholic and non-Catholic children to attend the religious classes. See note 461 *infra*.

138. The law does not concern itself with trifles.

139. PFEFFER, *CHURCH, STATE, AND FREEDOM* 168 (1953).

140. See *Thomas v. Collins*, 323 U.S. 516, 543 (1945). More recently, the Court appears to have retreated from this position. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 134 (1959); *Uphaus v. Wyman*, 360 U.S. 72, 77-78 (1959).

141. See text accompanying notes 125-26 *supra*.

142. Pfeffer, *Church and State: Something Less Than Separation*, 19 U. CHI. L. REV. 1, 23 (1951).

143. Kauper, *supra* note 135, at 837; Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1343 (1949).

144. *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697, 699 (Fla. 1959); *People ex rel. Lewis v. Graves*, 219 App. Div.

have rejected it since it may be explained on grounds of inherent compulsion.¹⁴⁵ Therefore, since the operation of the released time program in *McCollum* involved "no direct appropriation of any kind or direct expenditures of money of any kind,"¹⁴⁶ the use of public property there must be considered *de minimis*, and the Supreme Court's decision cannot be explained on the basis of financial aid to religion.¹⁴⁷

The *McCollum* decision can only be accounted for on the ground that the operation of the released time program—a program having no independent primary secular goal—resulted in compromising the conscientious beliefs of the complainant's child.¹⁴⁸ This inherent effect of released time must have been the "invaluable aid"¹⁴⁹ that the Court found the state was affording "sectarian groups . . . in that it helps to provide pupils for their religious

233, 236, 219 N.Y. Supp. 189, 192 (1927); *Nichols v. School Directors*, 93 Ill. 61, 63, 34 Am. Rep. 160, 162 (1879). In the first case, the court stated that the state constitution would be violated "if the use of the school buildings [for Sunday religious meetings] were permitted for prolonged periods of time, absent evidence of an immediate intention on the part of the Church to construct its own buildings. . . ." 115 So. 2d at 700.

145. *But see* Pfeffer, *The New York Regents' Prayer Case (Engel v. Vitale): Its Background, Meaning and Implications*, Committee on Law and Social Action Reports 6 (American Jewish Congress, June 26, 1962).

146. *People ex rel. McCollum v. Board of Educ.*, 396 Ill. 14, 24, 71 N.E.2d 161, 166 (1947). The court pointed out that

the classes were held in the schoolrooms during the current school period and the rooms were in use during the entire period, and, no doubt, the same cost for lights, heat, janitor service, etc. would exist whether or not the schoolroom was used at the particular time by this particular class. Any additional wear and tear on the floors would seem to be inconsequential. . . . Any additional wear and tear of furniture due to the religious education classes . . . would be negligible.

Ibid. See also *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 234 (1948) (Jackson, J., concurring).

147. As this author has suggested elsewhere, the use of the *de minimis* principle in this field may call not only for a measurement of the financial expenditure by government, but also for an examination of the financial benefit to religion. LOCKHART, KAMISAR & CHOPER, *SUPPLEMENT TO DODD'S CASES ON CONSTITUTIONAL LAW* 358 (1962). Although the former may be negligible, the latter may be quite substantial. See 35 ILL. B.J. 361, 363 (1947). However, this aspect of the problem was not considered at any stage of the *McCollum* litigation. See note 146 *supra*. The Court did find that the released time program afforded unconstitutional aid to religion, but it was not the financial benefit received that turned the decision. See text accompanying notes 148–53 *infra*. Cf. Cushman, *supra* note 129, at 352.

148. See Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUPREME COURT REV. 1, 29–30. For a complete discussion of how and why this is the result of the program's operation, see text accompanying notes 376–87 *infra*.

149. 333 U.S. at 212.

classes through the use of the State's compulsory public school machinery."¹⁵⁰ The Court did state that it was unnecessary to consider the contention that the program "was voluntary in name only because *in fact* subtle pressures were brought to bear on the students to force them to participate in it."¹⁵¹ This declaration may be explained as a response to appellant's argument that the factual evidence in the case belied the trial court's finding that Terry McCollum's teachers and classmates did nothing to subject him to embarrassment because of his religious opinions.¹⁵² The Court's statement should not be read as rejecting the contention that the released time program was in some way inherently coercive and therefore constitutionally defective. Indeed, other writers have found some form of inherent coercion to be the basis upon which the decision was predicated.¹⁵³

Furthermore, it would seem that the only justification for the Court's finding that appellant had standing to maintain the action was the fact that Terry was subject to certain subtle pressures inherent in the released time program.¹⁵⁴ The existing rule is well settled that a "party who invokes the power [of the federal courts to restrain unconstitutional acts] must be able to show not only that the statute is invalid but that he has sustained or is immediate-

150. *Ibid.* Further evidence that the Court relied on the inherent pressures of the activity:

The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.

Id. at 209-10.

151. *Id.* at 207 n.1. (Emphasis added.)

152. The trial court's finding may be found in Record, p. 68, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). Brief for Appellant, pp. 26-30, advanced the testimony of a number of witnesses that was contrary to this finding and explained how the testimony relied upon by the trial judge was inadequate. Although counsel for appellant interwove this contention with the "inherent compulsion" argument, the Court's statement was addressed only to those of appellant's arguments that took "issue with the facts found by the Illinois courts" 333 U.S. at 207.

153. *E.g.*, Sutherland, *Public Authority and Religious Education: A Brief Survey of Constitutional and Legal Limits*, in THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL 49 (Brown ed. 1958); 16 GEO. WASH. L. REV. 556, 558-59 (1948).

154. The Court perfunctorily rejected the contention that appellant had no standing. 333 U.S. at 206. Mr. Justice Black, the author of the Court's opinion, has indicated on other occasions that his standard on the question of standing in the church-state area is considerably more lenient than is the prevailing rule. See McGowan v. Maryland, 366 U.S. 420, 429 n.6 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 592 n.10 (1961).

ly in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."¹⁵⁵ The interest of appellant, Terry's mother, was asserted as that of a resident, taxpayer, and parent of a child then enrolled in a public school having a released time program.¹⁵⁶ The record made clear that appellant was an atheist who desired that her child not be indoctrinated with any religious teachings.¹⁵⁷ Although the Court permitted a local taxpayer to challenge local governmental action as being in violation of the establishment clause in *Everson*,¹⁵⁸ that case involved "a measurable appropriation or disbursement of school-district funds."¹⁵⁹ Since the released time program in *McCollum*, like Bible reading in the public schools,¹⁶⁰ did not involve a substantial disbursement, appellant had no standing as a taxpayer. If appellant had sought standing solely on the basis of the fact that she was a parent of an attending child, she would have failed because there could have been absolutely no showing of any direct injury. It could have been accurately said that there was "no assertion that [he] was injured or even offended thereby or that [he] was compelled to accept, approve, or confess agreement with any dogma or creed or even [attend released time religious classes]."¹⁶¹ Nor, under existing doctrine,¹⁶² could standing have been conferred on appellant on the ground that those who were injured were unable to assert their rights effectively.¹⁶³ Appellant satisfied the existing standing prerequisites by alleging the infringement of a constitutionally protected right—the right of her child to be free from certain inherent pressures to participate in a solely religious governmental activity irrespective of any direct coercion. Only by finding the recognition of such a right in *McCollum* may those who questioned appellant's standing be answered¹⁶⁴ and may the decision be satisfactorily explained.¹⁶⁵

155. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

156. 333 U.S. at 205.

157. Record, pp. 1–2, *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

158. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). See text accompanying notes 28–29 *supra*.

159. *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952).

160. *Cf. id.* at 429.

161. *Id.* at 432 (dictum).

162. See text accompanying notes 219–27 *infra*.

163. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459–60 (1958); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953).

164. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 232–33 (1948) (Jackson, J.); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 5–9 (1949); Kauper, *supra* note 135, at 834–35.

165. See generally Sutherland, *Establishment According to Engel*,

2. Other Doctrines

There is other support to be found in the decisions of the Supreme Court for the proposed constitutional standard. The Court has unanimously held that, unless justified by some valid overriding interest, a state cannot compel individuals to disclose their membership in an association if such identification, although not directly suppressing the right of free speech protected by the first amendment, nevertheless would have this consequence.¹⁶⁶ It can hardly be said that the state's engaging in a solely religious activity manifests an overriding public interest;¹⁶⁷ in fact, such state activity has been attacked as being in itself invalid.¹⁶⁸ When the state embarks on such a program and then grants the privilege of nonparticipation to conscientious dissenters to avoid problems under the free exercise clause,¹⁶⁹ disclosure of membership in a religious (or nonreligious) group results. Such identification, in turn, tends to compromise religious beliefs¹⁷⁰ that fall within the broad ambit of the first amendment's protection.¹⁷¹

This effect is generally unquestioned.¹⁷² The fact that this "re-

76 HARV. L. REV. 25, 31-35 (1962). Cf. Kurland, *supra* note 148, at 29-30.

166. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

167. See text preceding note 114 *supra*.

168. See text accompanying notes 79-82 *supra*.

169. It is undisputed that the free exercise clause, if not also the establishment clause, would be violated if participation in these solely religious activities were governmentally compelled. *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Zorach v. Clauson*, 343 U.S. 306, 311-12 (1952); *Lewis v. Allen*, 5 Misc. 2d 68, 72-73, 159 N.Y.S.2d 807, 811 (Sup. Ct. 1957); Kauper, *Released Time and Religious Liberty: A Further Reply*, 53 MICH. L. REV. 233, 234 (1954); 9 OHIO ST. L.J. 336, 341 (1948).

170. Cf. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958): "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

171. There is persuasive authority for the proposition that it would be unconstitutional for the Government itself to cause a religious nonconformist to be embarrassed, harassed, or humiliated so as to coerce him to compromise his conscientious beliefs. See *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960) (concurring opinion); *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950).

172. See text accompanying notes 87-101 *supra*. Cf. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958):

Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may

pressive effect . . . follows not from *state* action but from *private* community pressures¹⁷³ is irrelevant;¹⁷⁴ "the crucial factor is the *interplay* of governmental and private action, for it is only after the initial exertion of state power represented by the [introduction of solely religious programs] . . . that private action takes hold."¹⁷⁵

It is true that all of those Supreme Court decisions in the church-state area that have relied on a compulsion theory to find governmental action to be forbidden by the first amendment have involved instances of compulsion directly imposed by government.¹⁷⁶ However, the Court has shown no inclination to give any weight to differing degrees of governmental compulsion so long as it seems that the state action is likely to compromise conscientious beliefs or influence the freedom of religious choice. Thus, a state requirement that people who wish to become notaries public must declare their belief in God does not as forcefully compel the forsaking or influencing of conscientious beliefs as would be the case if the state prosecuted those who refused to declare their belief;¹⁷⁷ nor does the imposition of a license tax on religious colporteurs compel them as strongly as would a penal provision. But since "the loss of opportunity to obtain private employment . . . may be sufficient to persuade at least some uncommitted persons to adopt a religion,"¹⁷⁸ the Court did not hesitate in *Torcaso v. Watkins*¹⁷⁹ to strike down the required notaries' declaration by a unanimous vote; the license tax was held invalid in *Murdock v. Pennsylvania* because it "tends to suppress" religious practices.¹⁸⁰

induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.
173. *Id.* at 463.

174.

In the domain of these indispensable liberties [under the first amendment], the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. . . . The governmental action challenged may appear to be totally unrelated to protected liberties.

Id. at 461.

175. *Id.* at 463. (Emphasis added.) This same analysis is implicit in the decision holding an ordinance that forbade the distribution of anonymous handbills unconstitutional on the ground that it tended to restrict freedoms protected by the first amendment. *Talley v. California*, 362 U.S. 60 (1960). See generally Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 582-84 (1961).

176. See cases cited notes 177-80 *infra*.

177. *Cf.* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

178. 74 HARV. L. REV. 611, 614 (1961).

179. 367 U.S. 488 (1961).

180. 319 U.S. 105, 114 (1943).

It would seem to be only a small step to hold, as state courts have done,¹⁸¹ that when the state engages in a solely religious activity, its action is constitutionally barred if it inherently produces social compulsion to abandon religious convictions.

Before moving on, it should be noted that the constitutional significance of coercion in the area of church-state problems has not escaped attention. Thus, in evaluating several governmental programs that must be fairly characterized as solely religious, Professor Paul Kauper has relied on the absence of any sort of coercion to sustain their constitutionality.¹⁸² On the other hand, he condemns the appropriation of public funds for church buildings or ministers' salaries since "the maintenance of churches is itself not a governmental function and since it coerces the conscience of nonbelieving taxpayers."¹⁸³ Professor Robert Levy has concluded that "any program which operates to compel the young and impressionable to orient to religion should be unconstitutional."¹⁸⁴

3. *Application in Engel v. Vitale*

Thus, the way had been well paved for the Supreme Court specifically to restrict its *Regents' Prayer* decision to the compulsive effect on young children inherent in this solely religious activity by the state. Such a definite limitation would have clearly immuniz-

181. E.g., *Brown v. Orange County Bd. of Pub. Instruction*, 128 So. 2d 181 (Fla. Dist. Ct. App. 1960) (distribution of Gideon Bibles in public schools); *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953) (distribution of Gideon Bibles in public schools).

182. In discussing the chaplains in both houses of Congress, Professor Kauper states that "this is a plain case of spending federal money for religious purposes." Kauper, *supra* note 135, at 837. This seems clearly to indicate that he considers this a solely religious activity. He goes on to state that "it can hardly be considered a substantial use of public funds in aid of religion, and it is not seriously argued that anyone's conscience is coerced by this practice." *Ibid.* The final point is clearly sound although it would not be similarly valid if the chaplains gave daily prayer recitations in the public schools. In raising the question of "substantial use of public funds," Professor Kauper seems to present this as an independent criterion for judging solely religious activities. If it is, as it may well be, one might effectively argue that an annual expenditure of \$17,620, see 75 Stat. 320, 324 (1961), is hardly *de minimis*, even when compared to the entire federal budget. See also text accompanying note 147 *supra*.

As to released time programs, Professor Kauper concludes that it has not been demonstrated that they deprive anyone of any liberty. Kauper, *supra* note 135, at 236. An attempted refutation of the conclusion may be found at notes 376-87 *infra*.

183. *Id.* at 846. Here, again, the point made seems to be that this is a solely religious activity.

184. Levy, *Views from the Wall—Reflections on Church-State Separation*, 29 HENNEPIN LAW. 51, 55 (1961). Examination of the context of this statement seems to indicate that Professor Levy was concerned only with those public school "programs" that are solely religious.

ed the Court from the position, taken in the concurring opinion of Mr. Justice Douglas, that government cannot "constitutionally finance a religious exercise . . . whatever form it takes."¹⁸⁵ It would also have effectively distinguished the Regents' prayer situation from most "of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government,"¹⁸⁶ cited by Mr. Justice Stewart in his lone dissent. However, although the language used by the Court appears to be quite comprehensive,¹⁸⁷ it would be rash to conclude that *Engel* passed judgment on (or even hinted at) the long list of governmental activities disapproved by Mr. Justice Douglas¹⁸⁸ or brought forward by Mr. Justice Stewart.¹⁸⁹ The Court's statement that

185. *Engel v. Vitale*, 370 U.S. 421, 437 (1962) (concurring opinion). See note 188 *infra*.

186. *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (dissenting opinion). See note 189 *infra*.

187. See text accompanying notes 79-80 *supra*.

188. Among the governmental programs and activities that Mr. Justice Douglas would seem to find unconstitutional are congressional and armed service chaplains, use of the Bible for the administration of oaths, "In God We Trust" on coins and currency, and opening prayers in legislative chambers and courts—including the Supreme Court. None of these would seem to produce the inherent pressures that arise from a solely religious activity in the public schools and, thus, are subject to separate consideration. Also included were activities having an independent primary secular goal, such as the availability of funds for parochial schools, G.I. Bill payments to denominational schools, and National School Lunch Act benefits to religious schools. In addition, Mr. Justice Douglas expressed his present disagreement with his vote with the majority in *Everson* (see text accompanying notes 28-29 *supra*), a case raising problems very different from those presented by the Regents' prayer. See text accompanying notes 21-49 *supra*. The evil ingredient that he found to be common to all of these governmental activities was that they "insert a divisive influence into our communities." 370 U.S. at 442, 443. For criticism of this standard, see text accompanying notes 362-65 *infra*.

Mr. Justice Douglas found "no element of compulsion" in the case. 370 U.S. at 438. He stated that there was no more inherent coercion here than there was in the prayers that open sessions of Congress and the Court. *Id.* at 442. This seems to ignore the pertinence of the public school setting and the maturity of the participants. See text accompanying notes 87-107 *supra*.

189. In addition to a number of the matters referred to by Mr. Justice Douglas, Mr. Justice Stewart listed such things as presidential inaugural statements asking the protection and help of God and presidential proclamations of a National Day of Prayer. Neither of these produce effects that are realistically comparable to the social pressures produced in the public school atmosphere. Whether or not constitutional, they must be considered apart from the Regents' prayer.

Mr. Justice Stewart decided that the case was "entirely free of any compulsion . . . including any 'embarrassments and pressures,'" because "the state courts have made clear that those who object to reciting the prayer *must be*" free of these things. 370 U.S. at 445. (Emphasis added.) But no mandate of any court can free this solely religious activity from its concomitant inherent pressures.

"the Establishment Clause . . . does not depend upon any showing of direct governmental compulsion"¹⁹⁰ is entirely consistent with the rationale that the establishment clause is violated by certain laws that produce inherent, albeit *indirect and nongovernmental*, compulsion. So is the Court's pronouncement that the establishment clause "is violated by the enactment of laws which establish an official religion whether those laws operate *directly* to coerce nonobserving individuals or not."¹⁹¹ Those "laws which establish an official religion" might well be interpreted to mean those laws having no independent primary secular purpose or effect, and the entire pronouncement might not have been intended to deal with those "solely religious laws" that operate *neither directly nor indirectly* to coerce nonobserving persons.¹⁹² In any case, since the governmental program in issue in *Engel* did operate indirectly to compel dissenters, the decision should not, and may not, be read for the proposition that the establishment clause bars all solely religious programs by government.¹⁹³

Close examination of the positions taken by the two amici curiae also indicates that they perhaps meant less than would initially appear. To illustrate the thesis that the establishment clause is violated whenever government undertakes or sponsors a religious program, the argument was made that "the holding of a Mass in a public school during the regular day would violate the Establishment Clause even though all non-Catholic pupils were permitted or required to absent themselves."¹⁹⁴ This would be unconstitutional, but not simply for the reason that the state was "sponsoring [a] religious program"; an establishment clause violation would occur because the minority dissenters would be under the same social pressures from the Catholic majority as the dissenters were in *Engel*.¹⁹⁵ Remove the coercive effect of the public school at-

Mr. Justice Stewart chidingly questioned whether "the Court [was] suggesting that the Constitution permits judges and Congressmen and Presidents to join in prayer, but prohibits school children from doing so?" *Id.* at 450 n.9. The answer would seem to be that (1) the case at bar involved only school children and (2) the pressures inherent in the public school setting may constitutionally distinguish it from the other situations mentioned.

190. 370 U.S. at 430.

191. *Ibid.* (Emphasis added.)

192. This conclusion is supported by the opinion's explicit recognition, immediately following its broad statement, that laws that place the "power . . . and prestige of government . . . behind a particular religious belief" plainly result in indirect coercive pressures. 370 U.S. at 431.

193. *But see* Sutherland, *supra* note 165, at 35-36.

194. Brief of American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae, p. 17, *Engel v. Vitale*, 370 U.S. 421 (1962).

195. See 25 CAL. OPS. ATT'Y GEN. 319 (1955). This assumes that a

mosphere and have the Mass held in the public school on Sunday, and a significantly different question is presented.¹⁹⁶ Further, these amici's thesis was documented by citing *McCollum*,¹⁹⁷ as was the proposition advanced by the other amici that the first amendment's ban on establishment would be violated by state "participation in religious affairs."¹⁹⁸ The sound basis for *McCollum*, however, is the presence of inherent compulsion.¹⁹⁹

C. DISTINGUISHING THE INDISTINGUISHABLE

Acceptance of the proposed constitutional standard not only effectively circumscribes the *Engel* decision, but also provides a ready means for distinguishing between situations heretofore found by some to be indistinguishable. For example, Mr. Justice Jackson,²⁰⁰ seconded by several commentators,²⁰¹ charged that *McCollum's*

program of this sort would only be instituted if there were a Catholic majority. Cf. *Knowlton v. Baumhover*, 182 Iowa 691, 695, 166 N.W. 202, 203 (1918); *Williams v. Board of Trustees*, 172 Ky. 133, 364 Mo. 121, 129-31, 260 S.W.2d 573, 576-78 (1953). If for some reason this were not the case, the result should be the same because of the program's influence on Roman Catholic students who would not attend Mass otherwise, see text accompanying notes 221, 439-53 *infra*, and because of the influence on free religious choice generated by the public school sponsorship of such an activity. See text accompanying notes 244-46 *infra*.

196. See text accompanying notes 129-47 *supra*.

197. Brief of American Jewish Committee and Anti-Defamation League of B'nai B'rith as Amici Curiae, p. 17, *Engel v. Vitale*, 370 U.S. 421 (1962).

198. Brief of Synagogue Council of America and National Community Relations Advisory Council as Amici Curiae, p. 15, *Engel v. Vitale*, 370 U.S. 421 (1962).

199. It must be noted, however, that the Pfeffer brief argued that if the state's "conduct is religious, then it is outside the competence and jurisdiction of the State or its instrumentalities, and even if participation were not compulsory, the conduct would be unconstitutional." *Id.* at 17. The scope of this standard is not clear. From the context, it would not seem to apply only to the state's undertaking solely religious activities in the public schools and granting dissenters the right of nonparticipation; it seems to say that all solely religious activities by the state are barred. This is a matter that was clearly not in issue in *Engel*, and such a thesis is clearly unworkable and unacceptable. See text accompanying notes 140-44 *supra*. Even if this standard is meant to apply only to those governmental activities that require participation (the context of the statement does lend credence to this), query if these can be found to violate the establishment clause if it can be shown that they are neither inherently compulsive (as only mature adults may be involved) nor involve a substantial use of public funds. See note 182 *supra*. It is difficult to differentiate such a case from "In God We Trust" on coins and currency.

200. See *Kunz v. New York*, 340 U.S. 290, 311 n.10 (1951) (dissenting opinion); *Saia v. New York*, 334 U.S. 558, 569 (1948) (dissenting opinion).

201. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 7-8 (1949); Taylor, *Equal Protection of Religion: Today's Public School Problem*, 38 A.B.A.J. 277-78 (1952).

ban from the public schools of the solely religious activity of released time, *a fortiori*, determined the question of whether the state was permitted to bar the solely religious activities of some people in the public streets and parks. The theory was that since *McColum* forbade the use of tax-supported school property by any and all sects for the propagation of religion, it was patently anomalous for the Court to hold, as it did,²⁰² that the state was compelled to permit the nondiscriminate use of tax-supported street and park property for that same purpose.²⁰³ It is not difficult to combat this analysis. The effect of the activity in *McColum* was to coerce those who were either unwilling to participate or uninterested in doing so. This evil—a significant constitutional ingredient—is not present when the public streets or parks are used for religious purposes. No citizen who declines to participate is in any way compelled to do so, and therefore, no person's religious liberty is impaired.

One writer has stated that he is at a loss to determine "why it is constitutional for a public institution to *purchase* a sectarian book [such as the Gideon Bible], but not to enable its pupils to read such books as *gifts*" ²⁰⁴ The explanation is the same.²⁰⁵ While no one has ever argued that dissenters are compelled to desert their religious convictions because public school libraries contain sectarian literature, there has been expert testimony that public school sponsorship of the distribution of Bibles creates coercive pressures to do so.²⁰⁶

202. See cases cited note 200 *supra*.

203. Professor Corwin put it this way:

[T]he discrepancy between the two holdings is apparent. In one [*McColum*] it is held that a school board may not constitutionally permit religious groups to use on an equal footing any part of a school building for the purpose of religious instruction to *those who wish to receive it*. By the other [*Saia*] the public authorities are under a *constitutional obligation* to turn over public parks for religious propaganda to be hurled at all and sundry whether they wish to receive it or not. The Court seems to cherish a strange tenderness for *outré* religious manifestations which contrasts sharply with its attitude toward organized religion.

Corwin, *supra* note 201, at 8.

204. Lieberman, *A General Interpretation of Separation of Church and State and Its Implications for Public Education*, 33 PROGRESSIVE EDUCATION 129, 131 (1956).

205. Another reason for distinguishing these situations might be that the state has a secular educational aim in placing Bibles in public school libraries—to make this literature available for academic investigation. See text accompanying notes 333–37 *infra*. No such secular purpose is found in sponsoring Bible distribution. The goal of the Gideons International is to "win men and women for the Lord Jesus Christ." *Tudor v. Board of Educ.*, 14 N.J. 31, 33, 100 A.2d 857, 858 (1953).

206. *Id.* at 50, 100 A.2d at 867. See notes 501–09 *infra* and accompanying text.

In upholding the New York released time plan in *Zorach v. Clauson*, the Supreme Court, per Mr. Justice Douglas, implied that such solely religious activity is equivalent to "prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; [and] the proclamations making Thanksgiving Day a holiday . . ."²⁰⁷ Several state courts have sustained public school Bible reading on similar bases.²⁰⁸ Because of the presence of inherent coercion, it seems that *Zorach* was incorrectly decided²⁰⁹ and that daily Bible reading in the public schools is also unconstitutional.²¹⁰ Whether or not the other activities referred to are constitutionally valid, it is fairly clear that they are not inherently coercive, and therefore, they should not control the disposition of Bible reading and released time.

Relying on the governmental activities referred to by Mr. Justice Douglas, the House Committee on the Judiciary made the same faulty analogy when it stated that the inclusion of the words "under God" in the pledge of allegiance to the flag did not run afoul of the establishment clause.²¹¹ Immature dissenters from the amended flag pledge will surely be subject to the same coercive pressures in the public school as were the children in *Engel*. Because of this, whether the amended pledge to the flag will withstand attack should turn on whether it may be fairly characterized as a solely religious activity.²¹²

In a recent comprehensive article dealing with religion in the public schools, one writer has urged that "the Constitution directs the public school to be a completely secular agency" and that it "proscribes the use of public school funds, facilities, personnel, time, sponsorship, auspices, or authority for religious instruction, practice, or ritual, or for any other religious or religiously-oriented purpose, direct or indirect."²¹³ Under this standard, not only were prayers, Bible reading, and released time found to be unconstitutional, but so also was the objective or academic study of religion.²¹⁴ "On the other hand, where information or ideas about religion are intrinsic to the subjects in the school's normal secular

207. 343 U.S. 306, 312-13 (1952).

208. *E.g.*, *Murray v. Curlett*, 228 Md. 239, —, 179 A.2d 698, 702 (1962); *Church v. Bullock*, 104 Tex. 1, 7, 109 S.W. 115, 118 (1908).

209. See text accompanying notes 397-403 *infra*.

210. See text accompanying notes 61-66 *supra*, 251-94 *infra*.

211. H.R. REP. NO. 1693, 83d Cong., 2d Sess. 3 (1954).

212. For discussion of this question, see text accompanying notes 536-41 *infra*.

213. Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 570 (1961).

214. *Id.* at 571-78. "Teaching religious doctrine, under any heading, is forbidden." *Id.* at 578.

curriculum, such as history, art, literature, etc., they should be presented factually and objectively."²¹⁵ Why a single course in comparative religion makes the school less of a "secular agency" than does the infiltration of religious matter into every other course in the curriculum is unclear. Why the one, and not the other, indirectly instructs in religion is also a mystery. The source of the difficulty seems to be the generality of the standard and the resulting perplexity in its application. Not so, hopefully, with the constitutional standard proposed here.²¹⁶

Finally, it should be noted that use of this suggested standard would even seem to satisfy those, at least for the time being, who contend that since the language of the fourteenth amendment bars only the denial of liberty, "so far as the fourteenth amendment is concerned, states are entirely free to establish religions, provided that they do not deprive anybody of religious liberty."²¹⁷

D. RELIGIOUS PRACTICES CARRIED ON WITHOUT OBJECTION

The seemingly broad standard suggested in *Engel*, as well as the rather sweeping criteria advocated by amici curiae in that case, may be read as stating that any governmental program that is solely religious violates the establishment clause. Under such a reading, there is no question as to the unconstitutionality of such a program, even when no one objects to it. However, since the constitutional principle of the proposed constitutional standard is grounded in the sanctity of the religious and conscientious scruples of public school children, a question does arise as to the extent of its application to a situation in which the public school engages in a solely religious practice and there is no opposition by the attending school children or their parents.

In the two cases in which the Supreme Court has found a practice of this sort to be contrary to the establishment clause, there were conscientious dissenters who instituted the litigation.²¹⁸ Thus, if the rationale of these two cases is to be explained on the basis of the proposed constitutional standard, the decisions must be narrowly read to hold no more than that the establishment clause

215. *Ibid.*

216. For discussion of the application of the proposed standard to the various religious aspects in the public schools, see text accompanying notes 229-566 *infra*.

217. Corwin, *supra* note 201, at 19. See also note 8 *supra*. It is interesting to theorize whether the establishment of an approved church by a state could be considered an infringement of religious liberty. See text accompanying note 183 *supra*.

218. *Engel v. Vitale*, 370 U.S. 421 (1962); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

is violated when a public school engages in a solely religious practice that is objected to by nonconforming students in attendance; if there are no dissenters, the practice may be valid even if, by its nature, it will likely result in compromising of religious beliefs or influencing of the students' freedom of conscientious choice. Furthermore, it may be argued that under prevailing standing requirements, only the parents of a student whose religious beliefs would preclude participation in the school program could be permitted to challenge its constitutionality.²¹⁹

However, the rationale that underlies the proposed constitutional standard calls for rejection of the above conclusions. Despite the fact that the privilege of nonparticipation is extended to religious nonconformists, the societal pressures on children to take part in state-sponsored religious activities often result in their choosing to do so in preference to suffering embarrassment among their peers. This being the fact, if the constitutionality of solely religious activities turns on whether opposition is voiced, these programs most often will be carried on without objection despite the fact that there are nonconformist pupils whose conscientious scruples are being compromised.²²⁰ Even if all the pupils are nominally members of the same religious sect, very likely solely religious programs of that sect conducted in the public schools will result, due to the inherent coercive pressures, in those students with marginal religious convictions being influenced in their freedom of religious choice.²²¹ Because of these same social pressures, the results of inquiries made by public school officials or parent groups to determine whether all students would be willing to participate in a public school religious activity will probably not reflect the true feelings of those polled.²²² Parents who are

219. See text accompanying notes 154-63 *supra*.

220. Cf. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 65-66 (1962), for the view that under the rule of *Betts v. Brady*, 316 U.S. 455 (1942), the uncounselled indigent defendant is caught in a similar vicious circle.

221. Hypothetically, if all of the students of a public school are of the Roman Catholic faith and it is therefore decided to have a daily Mass in the school with attendance being voluntary, the inherent pressures on those non-churchgoing Roman Catholic children to attend this Mass might well be greater than are the pressures on children of minority faiths to take part in majority religious activities.

222. For a decision stating that the unanimous consent of all parents could not save the ceding of public school control to church authorities, see *Williams v. Board of Trustees*, 173 Ky. 708, 726, 191 S.W. 507, 514 (1917). For a similar case in which the complainant appeared originally to have given his acquiescence, see *Knowlton v. Baumhover*, 182 Iowa 691, 700, 166 N.W. 202, 205 (1918).

religious dissenters usually refuse to instruct their children to decline to participate because of the fear of their children being subjected to ridicule.²²³ Many hesitate to institute litigation because of this and because of "the prospect of disrupted community life, with perhaps devastating consequences to the minority groups themselves, that would result from arbitrary interference with deep-seated community customs."²²⁴ The upshot of all of this would be that those values cherished in our society, which are at the foundation of the standard set forth in this article, would be emasculated by the rule that only those public school religious programs that are in fact objected to by attending students or their parents are unconstitutional. Prophylactic treatment is necessary. The law should be that those solely religious practices in the public schools that are likely to influence free religious choice or to compromise conscientiously held beliefs are per se unconstitutional.

Empirical studies in the church-state field have shown that judicial determinations of unconstitutionality do not substantially deter communities from engaging in patently invalid practices.²²⁵ Thus, the burden of policing falls upon the courts and ultimately upon those willing to risk the time, expense, and hazards, of litigation. If only those parents of attending children who conscientiously oppose public school religious actions were to have standing to attack them, many of these programs would go unchallenged despite the fact that the very values that are afforded the protection of the first amendment are being submerged. The "right" protected in these instances—the "right" to be free from social

223.

[T]he children's father testified that after careful consideration he had decided that he should not have [the children] excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be "labelled as 'odd balls'" before their teachers and classmates every school day; that children . . . were liable "to lump all particular religious difference[s] or religious objections [together] as 'atheism'" and that today the word "atheism" is often connected with "atheistic communism", and has "very bad" connotations, such as "un-American" or "pro-Red", with overtones of possible immorality.

Schempp v. School Dist., 201 F. Supp. 815, 818 (E.D. Pa.), *prob. juris. noted*, 371 U.S. 807 (1962).

224. Johnson, *Summary of Policies and Recommendations of the American Council on Education Committee on Religion and Education*, in *THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL* 9 (1958). See also Harry Golden, quoted in PFEFFER, *CHURCH, STATE, AND FREEDOM* 304 (1953); Sullivan, *Religious Education in the Schools*, 14 *LAW & CONTEMP. PROB.* 92 (1949). For an extremely forceful documentation of this point, see PFEFFER, *supra* at 402-04.

225. See Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 *AM. POL. SCI. REV.* 777, 784-86 (1959).

pressures to conform to the majority's religious practices that are governmentally sponsored—depends upon anonymity for its effective vindication. To require that it be claimed by those affected themselves would result in substantial nullification of the "right" at the very moment of its assertion.²²⁶ It would therefore be appropriate here for the Court to fashion an exception to the general requirement of standing because of the weighty countervailing policy of adequately securing these "rights."²²⁷

III. APPLICATION OF THE STANDARD

As has been observed by another proponent of a constitutional standard for church-state controversies, "the genius of . . . American constitutional law [is] that its growth and principles are measur-

226. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

227. See *United States v. Raines*, 362 U.S. 17, 22 (1960). The precise questions of upon whom standing should be conferred and how this may be accomplished doctrinally is beyond the scope of this article. The Supreme Court has permitted litigants to assert the constitutional rights of others, but none of the decided cases appear to be wholly satisfactory in solving the problem at hand. Professor Kenneth Davis has pointed out that this permission has been, and should be, granted much more liberally once the litigant has properly commenced a proceeding to vindicate his own rights. 3 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22.07 (1958). This doctrine is not very helpful here. Other cases may be explained on the basis of the fact that the litigant will suffer direct economic injury as a result of the state enactment. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). These, too, are not very useful.

However, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court permitted an association to act as the representative of its members in asserting their rights. Similar to the problem at hand, the rights of the NAACP members would have been nullified if the individuals themselves would have been required to assert them. By analogy, perhaps associations composed of religious dissenters may initiate proceedings. Perhaps it may also be said that such an association "is but the medium through which its individual members seek to make more effective the expression of their own views." 357 U.S. at 459. But *NAACP v. Alabama* also stressed the fact, not likely to be present in the case at hand, that there was "reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected" by the governmental action. *Id.* at 459-60.

Furthermore, the membership of many associations of minority religious groups is well known. In such instances, an action by the association will redound to the members, thus causing the members to discourage association action for the reasons discussed previously. Granting standing to the parent of any attending child, irrespective of religious conviction, on the ground that to force the parent to assert prejudice will expose the child to opprobrium would also probably be inadequate. Parents would realize that whether or not they were in fact religious dissenters, they would be so publicly regarded. It would seem that full protection can be afforded only by a more relaxed standing criterion. *But see Sutherland, Establishment According to Engel*, 76 HARV. L. REV. 25, 42 (1962).

ed in terms of concrete factual situations"²²⁸ Thus, it would be helpful to examine some of the many actual instances of religious intrusion into the public schools, and to determine their constitutional validity when measured by the proposed constitutional standard.

A. PRAYERS

The prayer at issue in *Engel v. Vitale*, neutral and inoffensive as it was,²²⁹ would fail the proposed constitutional test on several counts. Its purpose and effect was admittedly solely religious. The context in which it was delivered was inherently coercive. Due to its theistic basis, it would likely infringe on the conscientious beliefs of some members of the heterogeneous school population.

However, it need not logically follow that every public school prayer would similarly fail. First, if it were possible to devise a prayer against which no one could raise any conscientious objection, it could not be said that its recitation would result in the compromising or influencing of anyone's religious beliefs or choice. Such a prayer would therefore be free from constitutional attack under the proposed standard. Although projects have been undertaken to attempt to satisfy this requirement,²³⁰ the obstacles appear to be insurmountable. Certainly, the Regents' prayer having been rejected, any prayer that invokes the aid or blessing of the Deity runs afoul of this test. Not only would such a prayer

228. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961).

229. Compare the daily prayer offered by teachers in *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 614-15, 87 S.W. 792, 793 (1905):

Our Father who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupil have mutual love and respect. Watch over these children, both in schoolroom and on the playground. Keep them from being hurt in any way, and at last, when we come to die, may none of our number be missing around Thy Throne. These things we ask for Christ's sake. Amen.

This prayer was found not to be "sectarian," and therefore outside the state constitution's prohibition. Whether or not one agrees with the Kentucky court's definition of "sectarian," there is no question that this prayer is a "religious" exercise under the establishment clause. If recited in the same setting as the Regents' prayer, it would be invalid, under *Engel* or the proposed constitutional standard, even if the reference to Christ were omitted.

230. See Abbott, *A Common Bible Reader For Public Schools*, 56 RELIGIOUS EDUCATION 20 (1961); Note, 22 ALBANY L. REV. 156-57 (1958). Efforts to find a commonly acceptable prayer for American citizens are not confined to our time; Benjamin Franklin was among those who previously made the attempt. See *Engel v. Vitale*, 18 Misc. 2d 659, 660-62, 191 N.Y.S.2d 453, 459-60 (Sup. Ct. 1959).

cause conscientious objections to be raised by atheists, agnostics,²³¹ and humanists,²³² but it also appears that at least one of the three chief faiths would have religious objections.²³³ It has been shown that when many of the attempts to distill a "common core" or nonsectarian religion are scrutinized, the product "comes to mean the common core of orthodox Protestant belief, and . . . what a substantial majority—not of all, but of the believing—agree upon."²³⁴ Furthermore, theologians²³⁵ and educators²³⁶ have pointed out that aside from the fact that the task is extraordinarily difficult, even if it were possible, the result would probably be the reduction of theology to triviality and the creation of a public school sect that would be objectionable to all religious faiths. Moreover, it is likely that some people would conscientiously resist participation in any public supplication, regardless of its content.

Second, if it were possible to find that the prayer recitation had some independent primary secular purpose, it then could not be characterized as a solely religious activity and would thus avoid this requisite for unconstitutionality. Several endeavors of this nature have already been found wanting.²³⁷ The assertion that the prayer's purpose would be "to prepare the children for their work, to quiet them from the outside,"²³⁸ should probably also

231. See Vishny, *The Constitution and Religion in the Public Schools*, Decalogue J., June-July 1960, pp. 4, 6.

232. See Nichols, *Religion and Education in a Free Society*, in RELIGION IN AMERICA 148, 157 (1958).

233.

Jews believe . . . that when a faith in God is taught, it must be achieved in the context of historical associations accompanied by religious rites and symbols that are related to that particular religious group. . . . We do not appreciate the vague and undefined God to which the "American religion" offers lip service. We do not want our children to think of God only in abstract terms, nor in Christian terms. . . . This is a task, therefore, only for the home, synagogue or church.

Gilbert, *A Catalogue of Church-State Problems*, 56 RELIGIOUS EDUCATION 424, 428 (1961). See also note 73 *supra*.

234. PFEFFER, CHURCH, STATE AND FREEDOM 308 (1953). See also Comm. on Religion and Education, Am. Council on Education, *Religion in Public Education*, 42 RELIGIOUS EDUCATION 129, 161 (1947), which stated that permitting instruction in a common core religion "would be, at best, to assume that the support of an overwhelming majority of the people justified overriding the convictions of a minority."

235. Nichols, *supra* note 232, at 157-58.

236. American Council on Education, quoted in PFEFFER, *op. cit. supra* note 234, at 308-09.

237. See text accompanying notes 32-42 *supra*.

238. *Billard v. Board of Educ.*, 69 Kan. 53, 58, 76 Pac. 422, 423 (1904) (Lord's Prayer and Twenty-Third Psalm). See also *Doremus v. Board of Educ.*, 7 N.J. Super. 442, 454, 71 A.2d 732, 740 (Super. Ct. 1950).

fail, either because of disingenuousness,²³⁹ or because it would seem that if the prayer did produce placidity, it would be due originally to its religious effect.²⁴⁰

Third, if the circumstances under which the prayer were to be recited could be so molded as to remove the likelihood that there would be infringement or influencing of any student's religious or conscientious principles, it would be free from challenge despite its solely religious nature. One suggestion toward this end has been that only one student each day be invited to read the prayer while the others simply remain silent.²⁴¹ The difficulty with this is that the same social compulsion that operates on students to participate in group recitation would seem to operate here to force a dissenter to take his turn at reading before the class.²⁴² Even if only the teacher were to recite the prayer, with the students simply listening in silence, the result should probably be the same. It is likely that the conscientious scruples of some students would forbid even this quantum of "participation" in what is clearly a devotional exercise.²⁴³ Therefore, they would be inherently compelled to compromise their scruples. Furthermore, it is most reasonable to believe that the reading of a prayer, each and every day, "buttressed with the authority of the State and, more importantly to children, backed with the authority of their teachers, can hardly do less than inculcate or promote the inculcation of various religious doctrines in childish minds."²⁴⁴ Educators have

239. The proponent of this justification herself conceded that the prayer recitation "was religious to the children that are religious, and to the others it was not." *Billard v. Board of Educ.*, 69 Kan. 53, 58, 76 Pac. 422, 423 (1904). The court, in sustaining the practice did not do so on the ground that the prayer recitation was not a religious activity. Rather, it found that the exercises "were not a form of religious worship or the teaching of sectarian or religious doctrine" as forbidden by the state constitution. *Ibid.*

240. If the mere recitation of any reading would accomplish the teacher's goal, then, as indicated in the text, the practice may not be characterized as a solely religious activity and it is not, for that reason, violative of the establishment clause. However, the establishment clause may be violated for another reason. Although the practice would have the immediate secular end of maintaining order, it would also have the immediate effect of promoting religion. Since, by virtue of the above analysis that saves this practice from being a solely religious activity, the secular end *obviously* could be *just as well* attained by means that do not promote religion (e.g., recitation of one of Shakespeare's sonnets), the selection of a reading that furthers religion should be unconstitutional. *Accord*, *McGowan v. Maryland*, 366 U.S. 420, 466-67 (1961) (Frankfurter, J., separate opinion).

241. See *Engel v. Vitale*, 11 App. Div. 2d 340, 348-49, 206 N.Y.S.2d 183, 191 (1960) (Beldock, J., separate opinion).

242. This has occurred. See text accompanying note 106 *supra*.

243. See *Schempp v. School Dist.*, 177 F. Supp. 398, 401 (E.D. Pa. 1959).

244. *Id.* at 404. Cf. *The Effects of Segregation and the Consequences of*

expressed the opinion that even a single instance of school approbation of certain religious principles might have this effect.²⁴⁵ Surely, the daily repetition of devotional exercises will likely result in instilling religious values, thereby affecting the immature students' freedom of conscientious choice.²⁴⁶ Many students will be influenced to engage more actively in religious endeavors, and the effect of this practice might be to cause pupils of dissenting religious faiths to compromise their scruples.

Several other suggestions merit consideration. One has been "to have each school day commence with a quiet moment that would still the tumult of the playground and start a day of study."²⁴⁷ Since each student could utilize this moment of silence for any purpose he saw fit, the activity may not be fairly characterized as solely religious, and since no student would really know the subject of his classmates' reflections, no one could in any way be compelled to alter his thoughts. However, the proposal of recitation of the words of a song that invoke or make other hallowed references to the Deity as a replacement for a traditional prayer²⁴⁸ falls into a different category. Even if the singing of such a song in the public schools were wholly unobjectionable,²⁴⁹ the recitation of its words as a devotional exercise transforms its entire complexion. This is clearly no more than the designation of an official prayer, irrespective of by whom it is done, and it is invalid for reasons previously mentioned.²⁵⁰

Desegregation: A Social Science Statement, 37 MINN. L. REV. 427, 433 (1953):

The child who, for example, is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided; but he cannot readily cope with symbols of authority, the full force of the authority of the State—the school or the school board, in this instance—in the same manner.

See also Levy, *Views from the Wall—Reflections on Church-State Relationships*, 29 HENNEPIN LAW. 51, 55 (1961).

245. See *Tudor v. Board of Educ.*, 14 N.J. 31, 51–52, 100 A.2d 857, 868 (1953). But see text accompanying notes 524–25 *infra*.

246. Cf. *Miller v. Cooper*, 56 N.M. 355, 244 P.2d 520 (1952), in which the court permitted occasional public school religious activities, but held invalid the continuous availability of religious pamphlets.

247. Editorial, *Washington Post*, June 28, 1962, § A, p. 22, col. 2. See also N.Y. Times, Aug. 30, 1962, § 1, p. 18, col. 2.

248. See N.Y. Times, July 29, 1962, § 1, p. 36, col. 4; *id.*, Aug. 10, 1962, § 1, p. 21, col. 1; *id.*, Aug. 30, 1962, § 1, p. 18, col. 3.

249. See text accompanying notes 541–44 *infra*.

250. See text accompanying notes 62–66 *supra*.

B. BIBLE READING

Past and present, one of the most prevalent solely religious practices carried on in the public schools has been Bible reading.²⁵¹ Its legality and constitutionality have evoked a glut of litigation in the state courts and a surfeit of writing by legal and lay commentators. The Supreme Court has managed to elude the problem in the past,²⁵² but appears finally to be compelled to adjudicate it on the merits.²⁵³ By any reasonable test, this practice should be unconstitutional.²⁵⁴

The prime reason advanced by many state courts for sustaining the practice is that since the Bible is a nonsectarian document, no single religious sect benefits from its use.²⁵⁵ This factor is crucial under many state constitutional provisions that prohibit "sectarian" teaching in the public schools.²⁵⁶ However, it is irrelevant as far as the first amendment is concerned since, under the *Everson* dictum, "state action violates the ban . . . if it aids all religions on a nonpreferential basis."²⁵⁷ Under the proposed constitutional standard, the question of whether the Bible is sectarian is likewise inconsequential. This solely religious practice would be invalid so long as it is likely to cause any student, even if he belongs to no religious sect, to have his conscientious convictions influenced or compromised.²⁵⁸

However, it should be made plain that no version of the Bible may be fairly characterized as nonsectarian, even in the sense that none of the *major* religious faiths find it unobjectionable. The earliest challenges to Bible reading in the American public schools were leveled by members of the Roman Catholic faith, who con-

251. A recent survey estimates that 42% of American public schools have daily Bible reading. Geographically, the breakdown is: East—68%; South—77%; Midwest—18%; West—11%. Dierenfield, *The Extent of Religious Influence in American Public Schools*, 56 RELIGIOUS EDUCATION 173, 176 (1961).

252. See *School Dist. v. Schempp*, 364 U.S. 298 (1960); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

253. See note 3 *supra*. The Court had little choice but to hear the *Schempp* case since it was appealable as a matter of right under § 1253 of the Judicial Code, and the three-judge court below had found that public school Bible reading was contrary to the establishment clause.

254. See text accompanying notes 60–64 *supra*.

255. See *e.g.*, *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Commonwealth v. Cooke*, 7 Am. L. Reg. (o.s.) 417 (Mass. Police Ct. 1859); *Doremus v. Board of Educ.*, 5 N.J. 435, 75 A.2d 880 (1950); *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 44 N.W. 967 (1890).

256. See cases cited in note 255 *supra*; PFEFFER, CHURCH, STATE AND FREEDOM 387 (1953).

257. *Id.* at 391.

258. For examples, see text accompanying notes 105–07 *supra*.

scientiously objected to the use of the King James version.²⁵⁹ Although there has been some indication that this position is in a state of flux,²⁶⁰ recent litigation has again been undertaken by Catholic parents.²⁶¹ Unitarians,²⁶² members of the Jewish faith,²⁶³ Buddhists,²⁶⁴ and atheists²⁶⁵ have all asserted in the courts that public school Bible reading offends their religious and conscientious beliefs. Universalists and some Lutherans and Baptists also oppose the activity.²⁶⁶

A number of state courts, although a minority, have recognized the fact that no version of the Bible is acceptable to everyone.²⁶⁷ Theologians of all faiths encounter no difficulty in arriving at this conclusion.²⁶⁸ The Roman Catholic religion finds only the Douay version of the Bible acceptable;²⁶⁹ despite an assertion to the contrary,²⁷⁰ "a Catholic child commits a grave sin if he knowingly owns or reads from the Protestant version of the Bible."²⁷¹ Very recently, Catholic parents protested a New Jersey community's requirement that their children *listen* to readings from a King James Bible.²⁷² The Roman Catholic position has

259. See *e.g.*, *Donahoe v. Richards*, 38 Me. 379 (1854); *Commonwealth v. Cooke*, 7 Am. L. Reg. (o.s.) 417 (Mass. Police Ct. 1859); *Nessle v. Hum*, 1 Ohio N.P. 140 (C.P. 1894); *Hart v. School Dist.*, 2 Lancaster L. Rev. 346 (Pa. C.P. 1885). See also Boyer, *Religious Education of Public School Pupils in Wisconsin*, 1953 WIS. L. REV. 181.

260. See Reed, *Another Tradition at Stake*, Catholic Action, Feb., 1950, p. 4.

261. *E.g.*, *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953).

262. *Schempp v. School Dist.*, 177 F. Supp. 398 (E.D. Pa. 1959).

263. *Herold v. Parish Bd. of School Directors*, 136 La. 1034, 68 So. 116 (1915); *Church v. Bullock*, 100 S.W. 1025 (Tex. Civ. App. 1907).

264. *Commonwealth v. Renfrew*, 332 Mass. 492, 126 N.E.2d 109 (1955).

265. *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698 (1962).

266. 2 STOKES, CHURCH AND STATE IN THE UNITED STATES 571 (1950).

267. *E.g.*, *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 222 Pac. 801 (1924); *Wilkerson v. City of Rome*, 152 Ga. 762, 110 S.E. 895 (1922); *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N.W. 846 (1900).

268. See *Schempp v. School Dist.*, 177 F. Supp. 398, 401-02 (E.D. Pa. 1959); *Tudor v. Board of Educ.*, 14 N.J. 31, 46-47, 100 A.2d 857, 865 (1953); Harpster, *Religion, Education and the Law*, 36 MARQ. L. REV. 24, 44 (1952).

269. *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 343-45, 92 N.E. 251, 254 (1910); *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 383, 173 Pac. 35, 39 (1918).

270. See *Herold v. Parish Bd. of School Directors*, 136 La. 1034, 1040, 68 So. 116, 118 (1915).

271. PFEFFER, *op. cit. supra* note 256, at 384. See also authorities cited in Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 571 n.49 (1961).

272. Pfeffer & Baum, *Public School Sectarianism and the Jewish Child* 31 (American Jewish Congress, May, 1957). Roman Catholics "are forbidden . . . to listen to any version of [the Bible] unauthorized by the

been that the King James version is filled with error and false explanations and is used "as an instrument of proselytism."²⁷³ The Protestant stand regarding the Douay translation of the Bible is similar in many respects to the Roman Catholic feeling about the King James version.²⁷⁴

The Jewish faith finds the New Testament, whether it be the Douay or King James version, incompatible with Hebrew teachings.²⁷⁵ Of course, nonbelievers find the dogmatism of every version of the Bible as an imposition on their conscientious scruples.²⁷⁶ Nonetheless, the argument has been made that the Old Testament is generally immune from objection.²⁷⁷ Even discounting those minor religious groups that "in this country . . . are numerically small and, in point of impact upon our national life, negligible,"²⁷⁸ this argument is far from being accurate. Unitarians have testified that much of the Old Testament's content is contrary to their faith.²⁷⁹ A Jewish theologian has pointed out that there were specific instances in which the King James Old Testament had been

Roman Catholic Church." CATHOLIC ENCYCLOPEDIA 524, cited in Tyree, *Should What Is Rendered To God Be Commanded By Caesar?*, 44 PHI DELTA KAPPAN 74, 76 (1962).

273. Encyclicals of the Popes, quoted in Brief for Plaintiffs, p. 24, *Schempp v. School Dist.*, 177 F. Supp. 398 (E.D. Pa. 1959). See PFEFFER, *op. cit. supra* note 256, at 384:

[T]he translators' dedicatory preface [to the King James version] states that the purpose of the translation was to give 'such a blow unto that Man of Sin (the Pope) as will not be healed [and] to make God's holy truth to be yet more and more known to the people whom they ("Papists persons at home or abroad") desire still to be kept in ignorance.'

274. See *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 344-45, 92 N.E. 251, 254 (1910); *Tudor v. Board of Educ.*, 14 N.J. 31, 47, 100 A.2d 857, 865 (1953).

275. See *Kaplan v. Independent School Dist.*, 171 Minn. 142, 154-55, 214 N.W. 18, 22-23 (1927) (dissenting opinion); Comment, 43 ILL. L. REV. 374, 382 (1948); 27 TEXAS L. REV. 256, 258 (1948).

276. See Comment, 43 ILL. L. REV. 374, 382 (1948).

277. *Doremus v. Board of Educ.*, 5 N.J. 435, 448, 75 A.2d 880, 886 (1950).

278. *Id.* at 449, 75 A.2d at 887.

279.

In content, the father objected to material in the Old Testament regarding blood sacrifices, uncleanness, and leprosy, together with the whole concept of the Old Testament God which was contrary to the concept of deity which he endeavored to instill in his children. He testified that he did not want his children to acquire an image of Jehovah, the God of vengeance. He pointed out that in the very midst of the Ten Commandments was a verse asserting that God would visit the sins of the father upon the fourth generation . . . and the witness went on to assert that this concept of God was in sharp contrast with the God of his own church

Brief for Plaintiffs, pp. 5-6, *Schempp v. School Dist.*, 177 F. Supp. 398 (E.D. Pa. 1959).

imbued with a Christological significance.²⁸⁰ Clearly, there is no "English text of the Old Testament accepted fully by the several faiths."²⁸¹

Recognizing this inherent weakness of any complete version of the Bible, it has been suggested that the defect may be remedied by selecting those portions in any version that are in no way religious, but contain only moral principles that are common to *all* men.²⁸² If this could be done, the practice would be valid under the proposed standard. Not only could it not be fairly characterized as solely religious, but no one's conscientious beliefs could possibly be affected. The difficulty is that those who have advocated this course have concluded, somewhat contradictorily, that there is no one competent to select these portions.²⁸³ Even if it be assumed that such Biblical passages may exist, until there is at least a general consensus as to which ones they are, the establishment clause should forbid any individual or group from choosing some and causing them to be read in the public schools. If this were permitted, for reasons previously advanced,²⁸⁴ it is very likely that infractions of religious liberty would occur and go unredressed.

Other attempts have been made to justify the constitutionality of public school Bible reading. They also fail on examination. Several state courts have excused the practice on the ground that dissenters are afforded the right of nonparticipation.²⁸⁵ The inadequacy and fictitiousness of this position have already been belabored.²⁸⁶ Others have attempted to validate the practice because

280. Dr. Solomon Grayzel, cited *id.* at p. 10.

281. Committee on Religion and Public Education of the National Council of the Churches of Christ, *Relation of Religion to Public Education—A Study Document*, International J. of Religious Education, Apr. 1960, pp. 21, 28.

282. See *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 286-93, 255 Pac. 610, 615-17 (1927); Harpster, *supra* note 268, at 45.

283. *Ibid.* See also Comment, 43 ILL. L. REV. 374, 382 (1948): "However carefully selections for reading may be chosen it is inevitable that some students will be forced to listen to portions which they cannot accept."

284. See text accompanying notes 219-24 *supra*.

285. *E.g.*, *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 293, 255 Pac. 610, 617 (1927); *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21, 31 (Fla. Sup. Ct. 1962); *Pfeiffer v. Board of Educ.*, 118 Mich. 560, 562-63, 77 N.W. 250, 251 (1898); *Kaplan v. Independent School Dist.*, 171 Minn. 142, 151, 214 N.W. 18, 21 (1927).

286. The consistency of holding, on the one hand, that the Bible is non-sectarian and then holding, on the other hand, that it is saved from religious liberty objection because of the right of nonparticipation has long been questioned. See *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 351, 92 N.E. 251, 256 (1910); Note, 3 RUTGERS L. REV. 115, 125 (1949). This

it does not transform the public school into a "place of worship."²⁸⁷ While this contention may satisfy some state constitutional prerequisites, it has no bearing vis-a-vis the establishment clause.

A provision that the reading of the Bible be done without comment has often been submitted as a sustaining feature.²⁸⁸ This argument ignores the fact that to some sects, "the reading in public of any portion of any version of the Scriptures unaccompanied by authoritative comment or explanation, or the reading of it privately by persons not commissioned by the church to do so, is objectionable, and an offense to their religious feelings"²⁸⁹ In addition, since other readings in the curriculum are subjected to critical comment and scrutiny, there is reasonable likelihood that the practice of reading the Bible without discerning comment "will tend to the acceptance by those pupils of the statements in the selections as true."²⁹⁰ Finally, the daily repetition of this activity, in some schools for a substantial segment of time,²⁹¹ under the sponsorship of school and teacher will surely have its effect²⁹² even if done without comment.²⁹³ These points also

dilemma would be solved only if Bible reading could be characterized as a secular activity. See text accompanying notes 117-25 *supra*. It is clear that this may not be done.

287. *E.g.*, *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884); *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905).

288. *E.g.*, *Carden v. Bland*, 199 Tenn. 665, 288 S.W.2d 718 (1956).

289. *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 871, 91 N.W. 846, 847 (1902). For further documentation of this in regard to the Roman Catholic position, see note 272 *supra*; Brief for Plaintiffs, p. 25, *Schempp v. School Dist.*, 177 F. Supp. 398 (E.D. Pa. 1959).

290. *Pfeiffer v. Board of Educ.*, 118 Mich. 560, 578, 77 N.W. 250, 257 (1898) (dissenting opinion). Of interest also is the following statement in *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 194-95, 44 N.W. 967, 973 (1890):

A most forcible demonstration . . . is found in certain reports of the American Bible Society of its work in Catholic countries . . . in which instances are given of the conversion of several persons from 'Romanism' through the reading of the scriptures alone; that is to say, the reading of the Protestant or King James version of the Bible converted Catholics to Protestants without the aid of comment or exposition.

291. In *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21, 31 (Fla. Sup. Ct. 1962), the court noted that Bible reading consumed from three to five minutes each day.

292. Dean Weigle has written that "the message of the Bible is the central thing The Bible contains the Word of God to man." Quoted in Brief for Plaintiffs, p. 14, *Schempp v. School Dist.*, 177 F. Supp. 398 (E.D. Pa. 1959).

293. Notice again the inconsistency between finding the Bible to be nonsectarian and, at the same time, finding no infringement of religious liberty only because it is read without comment. See note 286 *supra*; Note, 28 GEO. WASH. L. REV. 579, 611 (1960).

overcome the defenses occasionally asserted that the mere reading of the Bible denotes no implication as to the truth or falsity of the subject matter and that merely listening to it compels no student to believe in what he has heard.²⁹⁴

1. *Teaching of Moral Values*

The argument is frequently made that Bible reading, religious study, and other devotional exercises in the public schools are indispensable to teaching students moral values and qualities, and that this is a vital function of our public schools in teaching good citizenship and in combating "Godless Communism."²⁹⁵ If this means that the only available method for inculcating students with these values is first to imbue them with religious ideals, then regardless of how important this may be, the establishment clause should forbid the training.²⁹⁶

However, the prospects for the public schools' producing good citizens are not quite so bleak. There is ample evidence that religion in general education is unnecessary to produce better child behavior;²⁹⁷ moral values may be very effectively taught without the aid of religion.²⁹⁸ "However we [citizens of the American democracy] may disagree on religious creeds, we can agree on moral and spiritual values."²⁹⁹ Educators and philosophers have shown³⁰⁰ that such universally accepted values as justice, property rights, respect for law and authority, and brotherhood³⁰¹ may be derived from nonreligious sources³⁰² and may be enforced

294. *E.g.*, *Donahoe v. Richards*, 38 Me. 379, 399 (1854). See also *Spiller v. Inhabitants of Woburn*, 12 Allen 127 (Mass. 1866).

295. See, *e.g.*, Taylor, *Equal Protection of Religion: Today's Public School Problem*, 38 A.B.A.J. 277, 339 (1952). See also *Hart v. School Dist.*, 2 Lancaster L. Rev. 346, 352 (C.P. 1885).

296. See text accompanying notes 38-42 *supra*.

297. Seminar No. 4, *The Public School and Religious Education*, 49 RELIGIOUS EDUCATION 143, 144-45 (1954).

298. EDUCATIONAL POLICIES COMM'N, NATIONAL EDUCATION ASS'N, MORAL AND SPIRITUAL VALUES IN THE PUBLIC SCHOOLS 17-30 (1951).

299. *Id.* at 33.

300. *Id.* at 37-45.

301. The public school teaches brotherhood as part of the democratic ideal. The churches teach it as a response to God's commandment to love one's neighbor. The secular humanist practices it as an expression of a purely human value. Comm. on Religion and Public Education of the National Council of the Churches of Christ, *Relation of Religion to Public Education—A Study Document*, International J. of Religious Education, Apr. 1960, pp. 21, 25.

302. "After all, if Aristotle, 350 years before the advent of Christianity, could write a rather comprehensive and enduring work on ethics, I do not see why it should be so difficult for modern American secularists of good will to do likewise." Address by F. E. Flynn, Professor of Philosophy, Col-

by nonreligious sanctions.³⁰³ In fact, there is persuasive authority for the view that moral values are better learned through concrete examples during the school day than through lessons that preach them.³⁰⁴

Other generally recognized values, "in the sense that they are common to all segments of our society, irrespective of religious faith or philosophic school,"³⁰⁵ are "responsibility, honesty, temperance, and self-control."³⁰⁶ Thus, while the Illinois legislature demands that "every public school teacher shall teach the pupils honesty, kindness, justice and moral courage for the purpose of lessening crime and raising the standard of good citizenship,"³⁰⁷ it recognizes that this aim may be accomplished on a neutral basis by making clear that the statute "shall not be construed as requiring religious or sectarian teaching."³⁰⁸ Similarly, New York prescribes courses in "patriotism and citizenship," but implies that this goal may be attained by "instruction in the history, meaning, significance and effect of the provisions of the constitution of the United States, [and of the state of New York], the amendments thereto, [and] the declaration of independence."³⁰⁹ Surely it may. While teachers should educate their students about the fact that most of our citizens believe that there are various religious sources and sanctions for our moral values,³¹⁰ they can successfully instill commonly cherished values without engaging in religious indoctrination.

Although one writer, in his intellectual struggle to validate Bible reading, went so far as to concede that the machinations

lege of St. Thomas, to the West St. Paul Federation of Teachers, Sept. 20, 1962.

303. "[T]he [ancient] Greeks are an excellent illustration of a people whose principles of conduct were independent of religious sanction Buddhism is primarily, if not entirely, a system of ethics; one of conduct, without the inducements of rewards and punishments characteristic of Western religions." THAYER, *THE ATTACK UPON THE AMERICAN SECULAR SCHOOL* 205-06 (1951). See also THAYER, *THE CHALLENGE OF THE PRESENT TO PUBLIC EDUCATION* 14-16 (1958).

304. See EDUCATIONAL POLICIES COMM'N, *op. cit. supra* note 298, at 60-70; HARTFORD, *MORAL VALUES IN PUBLIC EDUCATION passim* (1958); THAYER, *THE ATTACK UPON THE AMERICAN SECULAR SCHOOL* 212-18 (1951).

305. *Id.* at 210.

306. *Ibid.*

307. ILL. REV. STAT. ch. 122, § 27-12 (1961).

308. ILL. REV. STAT. ch. 122, § 27-16 (1961).

309. N.Y. EDUC. LAW § 801.

310. See Nichols, *Religion and Education in a Free Society* in RELIGION IN AMERICA 148, 157 (Cogley ed. 1958). Cf. Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 577-78 (1961).

of his proposal were "contrary to reason,"³¹¹ all others seem to have recognized that there are some religious objections to every version of the Bible.³¹² When it is read as part of a devotional exercise, the activity must be fairly characterized as solely religious.³¹³ While teachers no longer beat dissenting students,³¹⁴ the fact is that there is an inherent compulsion to participate, and therefore, conscientious scruples are influenced and compromised. The practice should be held to violate the establishment clause.

2. *Academic Study of Religion*

One last area of discussion concerning the place of the Bible in the public schools must be considered. The suggestion has frequently been made that the Bible (and religion generally) is a vital educational tool. If this means "that the highest duty of those who are charged with the responsibility of training the young people . . . in the public schools is in teaching both by precept and example that in the conflicts of life they should not forget God,"³¹⁵ then it must be rejected under any reasonable standard. Aside from the fact that this is educationally unacceptable,³¹⁶ the Court has made clear that the establishment clause forbids governmental indoctrination of religious beliefs and public school religious instruction.³¹⁷ Under the proposed constitutional standard, this effort to inculcate religious beliefs would unquestionably be a solely religious activity likely to influence and compromise the students' freedom of conscientious choice. However, it is totally inaccurate to conclude, as many have done, that this rejection "sanctions [the public schools'] utilization for the purposes of atheists."³¹⁸ This would be correct only if the public schools were

311. Harpster, *supra* note 268, at 46.

312. E.g., Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 842 (1954); Note, 22 ALBANY L. REV. 156, 172 (1958).

313. See Murray v. Curlett, 228 Md. 239, —, 179 A.2d 698, 708 (1962) (dissenting opinion).

314. See Commonwealth v. Cooke, 7 Am. L. Reg. (o.s.) 417 (Mass. Police Ct. 1859).

315. Carden v. Bland, 199 Tenn. 665, 681, 288 S.W.2d 718, 725 (1956). See also Church v. Bullock, 100 S.W. 1025, 1027 (Tex. Civ. App. 1907): "It may be said that said exercises tended to teach that there was an Almighty God; but this cannot be held objectionable"

316. American public education "disapproves indoctrination with reference to matters of belief." Comm. on Religion and Education, Am. Council on Education, *Religion in Public Education*, 42 RELIGIOUS EDUCATION 129, 161 (1947).

317. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

318. Schmidt, *Religious Liberty and the Supreme Court of the United States*, 17 FORDHAM L. REV. 173, 185 (1948).

either constitutionally permitted or forced to teach that there is no God. Obviously, the first amendment forbids this just as much as it forbids exhortations to the contrary. The result, therefore, is one of true neutrality.

It is also error to deduce that this rejection demands "that the child has a 'legal duty' to put all this time in on secular subjects, none on religious subjects";³¹⁹ that it results in "the compulsory exclusion of any religious element and the consequent promotion and advancement of atheism";³²⁰ that it "surrender[s] these schools to the sectarianism of atheism or irreligion";³²¹ that it bans all study of God as connected with our principles of government;³²² or that it compels silence about the Bible, religion, and God, thus impressing school children that these matters are insignificant.³²³ It can hardly be denied that "we are a religious people whose institutions presuppose a Supreme Being"³²⁴ since it is a matter of "common notoriety"³²⁵ that the great majority of our citizens are religious in the sense that they do believe in God.³²⁶ Although there is some dispute concerning the percentage of our population that is affiliated with organized religious groups,³²⁷ the most recent government survey showed that less than three percent of all persons over the age of 14 reported that they had no religion whatever;³²⁸ almost 95 percent of the population considered themselves to be either Protestant, Roman Catholic, or Jewish.³²⁹ Nor can it be denied that "acknowledgement of a Supreme Being has . . . been a part of our history."³³⁰

319. Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 36 (1949).

320. Engel v. Vitale, 10 N.Y.2d 174, 184, 176 N.E.2d 579, 583 (1961) (Burke, J., concurring opinion).

321. Luther A. Weigle, formerly Dean of Yale Divinity School, quoted in PFEFFER, CHURCH, STATE, AND FREEDOM 291 (1953).

322. Brief for Intervenors-Respondents, pp. 55-56, Engel v. Vitale, 370 U.S. 421 (1962).

323. Schmidt, *supra* note 318, at 187-88. See also PARSONS, WHICH WAY, DEMOCRACY? 11 (1939).

324. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

325. Cf. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960).

326. PFEFFER, *op. cit. supra* note 321, at 289, has acknowledged that "we are a religious people even though our government is secular."

327. Pfeffer contends that the figure is only about 50%. *Id.* at 303. This must be compared with the fact that the various religious bodies claim church membership in 1960 of 64% of the total population. BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 48 (83d ed. 1962).

328. *Id.* at 46.

329. *Ibid.* Query as to how many of these felt "compelled" to make such a disclosure.

330. VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, THE NEW YORK PRAYER CASE 4 (1962).

While there is some dispute as to how religious the founding fathers were,³³¹ the heritage of this country, both in the past and at present, is replete with examples of theistic and religious influences too multitudinous to enumerate fully.³³²

These being the facts, not only would it be virtually impossible, as a practical matter, to obliterate all references to religion from the public schools, but it would be educationally undesirable.³³³ But a public school program that seeks to prevent children from growing up as religious illiterates may not be fairly characterized as a solely religious activity. There is a distinct and weighty public purpose in seeing that all school children comprehend the role that religion has played in this country's evolution³³⁴ and that they have some understanding of the nature of the conscientious beliefs possessed by most of our citizens. Under the proposed constitutional standard there would be no constitutional objection³³⁵ to an academic study in comparative religion³³⁶ or to

331. See Pfeffer, *Church and State: Something Less Than Separation*, 19 U. CHI. L. REV. 1, 19-20 (1951).

332. A partial list might include the fact that the Declaration of Independence refers to the Deity four times; that the constitutions of 49 states acknowledge the existence of God and many imply that the rights and liberties of the people issue from God and express gratefulness therefore. See Brief for Respondents, pp. 44-54, *Engel v. Vitale*, 370 U.S. 421 (1962). "In God We Trust" has been impressed on our coins since 1865. In 1956, Congress adopted these words as our national motto. Lincoln's Gettysburg Address referred to God, as did the Mayflower Compact of 1620 and Madison's famous Memorial and Remonstrance Against Religious Assessments. Such national monuments as the Tomb of the Unknown Soldier, the Washington Monument, and the Lincoln and Jefferson Memorials all contain inscriptions mentioning the Deity. The Northwest Ordinance of 1787 stated that religion was necessary to good government. All of our Presidents have asked for the protection or help of God on assuming office. See *Engel v. Vitale*, 370 U.S. 421, 446-49 (1962) (Stewart, J., dissenting).

333. See the views expressed at a seminar of educators in Seminar No. 4, *The Public School and Religious Education*, 49 RELIGIOUS EDUCATION 143, 144-45 (1954); Cosway & Toepfer, *Religion and the Schools*, 17 U. CINC. L. REV. 117, 142 (1948). "An educated person cannot be religiously illiterate." Comm. on Religion and Education, Am. Council on Education, *supra* note 316, at 160.

334. "A course in the history of California which did not describe the early Catholic missions is unthinkable." 25 CAL. OPS. ATT'Y GEN. 325 (1955). This same report found prayers and Bible reading in the public schools to be contrary to the first amendment.

335. But see text accompanying notes 347-48 *infra*.

336. *Accord*, e.g., PFEFFER, *op. cit. supra* note 321, at 309. Sutherland, *Public Authority and Religious Education*,—*A Brief Survey of Constitutional and Legal Limits*, 52 RELIGIOUS EDUCATION 256 (1957); Vishny, *The Constitution and Religion in the Public Schools*, 10 Decalogue J. June-July 1960, pp. 4, 6. But see Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 578 (1961).

the study of the Bible as an artistic work.³³⁷ The salient distinction is that this would be teaching objectively *about* religion and the Bible and would not be religious indoctrination.

The academic study of religion may not take the form of teaching "that religion is sacred"³³⁸ nor present religious dogma as factual material.³³⁹ The only purpose for this approach is to inculcate religious beliefs. Nor may daily devotional Bible reading exercises with the privilege of nonparticipation be validated merely by characterizing them as an "elective course in non-sectarian Bible study."³⁴⁰ The difference between a devotional exercise and an ordinary literature course that examines the Bible, attempting no indoctrination and therefore not exerting pressure on students, is the difference between a solely religious program that is likely to result in the influencing or compromising of students' conscientious scruples and a secular act by government that is within its power.

It is not easy to deny, at least where younger children are concerned, that even an objectively presented academic examination of the Bible, or of religion generally, will result in some indoctrination.³⁴¹ But to concede that there is much truth in the contention that "the young mind cannot grasp the nebulous distinction between the Bible as literature and the Bible as sectarian instruction"³⁴² is not automatically to invalidate a school board's good faith attempt³⁴³ to educate students with "much useful information about the religious faiths, the important part they have played in establishing the moral and spiritual values of American life,

337. See *Schempp v. School Dist.*, 177 F. Supp. 398, 404 (E.D. Pa. 1959); 25 CAL. OPS. ATT'Y GEN. 325 (1955).

338. Such was the announced purpose of a program adopted, in the name of academic study of religion, by the Denver school system for "intergroup education." Herberg, *Religion, Democracy, and Public Education*, in *RELIGION IN AMERICA* 118, 136 (Cogley ed. 1958).

339. See Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 523-24 (1960).

340. This was suggested in Creel, *Is It Legal for the Public Schools of Alabama to Provide an Elective Course in Non-Sectarian Bible Instruction?*, 10 ALA. LAW. 86, 94 (1949).

341. PFEFFER, *op. cit. supra* note 321, at 311; Sutherland, *supra* note 336; Vishny, *supra* note 336.

342. Cosway & Toepfer, *supra* note 333, at 137.

343. The problem of dealing with an unconstitutional legislative "motive" of this kind is a vexing one. See Emerson & Haber, *supra* note 339, at 524. However, it is far from insuperable. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915). See generally Israel, *On Charting A Course Through The Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 140 n.138 (1962).

and their role in the story of mankind."³⁴⁴ No doubt, indoctrination often results from academic pursuits. Therefore, although the wisdom of reserving this inquiry to the higher grades may be decided by local authorities,³⁴⁵ it would not seem to be a proper question for the Supreme Court.³⁴⁶

However, despite the fact that the activity is secular and thus immunized from the proposed constitutional standard, it may still be in violation of the establishment clause. The thesis suggested is that when a secular activity by government results not only in attainment of a civil objective, but also promotes religion, the establishment clause is violated if the civil goal may be accomplished *just as well* by means that do not promote religion.³⁴⁷ Thus, it may be argued that the establishment clause demands that the objective study of religion or the Bible be confined to those higher grades where the influencing or compromising of religious beliefs would not occur because the audience is adult enough to distinguish between indoctrination and academic discussion.³⁴⁸ The contention would be quite convincing if it could be shown that, by so doing, the state's secular objective of making students religiously literate could be just as effectively achieved.

The Roman Catholic church has voiced strong opposition to allowing its children, at any age, to participate in academic courses in religion.³⁴⁹ It has also been observed that "the objective teaching of religion is likely to be unacceptable to most churches."³⁵⁰ In the first analysis, this becomes only one factor to be considered in making the legislative choice. If, however, some religious sect demands that its members do not participate in this instruction as a matter of religious dogma, the question becomes

344. EDUCATIONAL POLICIES COMM'N, NATIONAL EDUCATIONAL ASS'N, MORAL AND SPIRITUAL VALUES IN THE PUBLIC SCHOOLS 78 (1951).
345.

The unity of our own country, our understanding of the other nations of the world, and respect for the rich religious traditions of all humanity would be enhanced by instruction about religion in the public schools. Like any other teaching in which deep personal emotions are involved, such instruction should, of course, give due consideration to the varying degrees of maturity of the students.

Id. at 78-79.

346. *Cf.* Braunfeld v. Brown, 366 U.S. 599, 608 (1961). See generally Sutherland, *Public Authority and Religious Education: A Brief Survey of Constitutional and Legal Limits*, in THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL 67 (Brown ed. 1958).

347. See note 240 *supra*.

348. *Cf.* Kalven, *A Commemorative Case Note, Scopes v. State*, 27 U. CHI. L. REV. 505, 518 (1960). But *cf.* Comment, 32 MARQ. L. REV. 138, 144 (1948).

349. See PFEFFER, *op. cit. supra* note 321, at 310.

350. *Ibid.*

one of whether the free exercise clause is violated by compelling attendance in these courses. Here, as elsewhere,³⁵¹ a difficult and delicate free exercise problem is raised when there is a direct conflict between a religious tenet and action compelled by the state—that is, when the state, in pursuit of a secular purpose demands on pain of criminal prosecution that a person compromise his religious scruples.³⁵² The Supreme Court has not clearly articulated any principle to govern these situations,³⁵³ and the issue is beyond the scope of this article.³⁵⁴ What should be made plain, however, is that regardless of whether participation in the program may be made mandatory under the free exercise clause, the state is engaging in a secular activity when it introduces the academic study of religion into the public schools. Therefore, with one possible reservation,³⁵⁵ the establishment clause is not in issue and religious objections to the activity may not result in its abolition.³⁵⁶

No doubt there are practical difficulties in administering a program of teaching *about* religion. It may be argued that instructors, who are themselves affiliated with a particular sect, cannot or will not objectively present all points of view;³⁵⁷ the result, especially

351. See text accompanying notes 118–22 *supra*.

352. See *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

353. Cases presenting the problem are *Prince v. Massachusetts*, 321 U.S. 158 (1944); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Reynolds v. United States*, 98 U.S. 145 (1878).

354. The Court has stated that “legislative power . . . may reach people’s actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one’s religion.” *Braunfeld v. Brown*, 366 U.S. 599, 603–04 (1961) (dictum). If this be the standard, the question of whether the state may demand a religious dissenter to attend classes in the objective study of religion turns on whether the Court feels that any student’s failure to attend would be “in violation of important social duties or subversive of good order.”

On the other hand, the Court has also noted the importance of whether the religious freedom asserted by the dissenter brings him “into collision with rights asserted by any other individual.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943). It is fairly plain that by absenting themselves from classes engaged in studying about religion, the objectors would not be directly affecting anyone else. Thus, it could be argued that their free exercise claim should be upheld. However, in *Reynolds v. United States*, 98 U.S. 145 (1878), the Court upheld the conviction of a Mormon polygamist who defended on the ground that the tenets of his church demanded that he practice polygamy. Here it would seem that the defendant’s action affected only those persons who volunteered to be affected. For general discussion of this problem, see LOCKHART, KAMISAR & CHOPER, SUPPLEMENT TO DODD’S CASES ON CONSTITUTIONAL LAW 400–01 (1962).

355. See text accompanying notes 347–48 *supra*.

356. See text accompanying notes 117–25 *supra*.

357. See Margolin, Book Review, 72 YALE L.J. 212, 214 (1962).

as far as the younger children are concerned, will be indoctrination at least as powerful as that obtained by a solely religious activity. If the secular purposes of a program of the academic study of religion were inherently subject to abuse, then the only remedy might be to ban the activity.³⁵⁸ But the alleged defect appears not to be inherent. Educators have stated that "the public school can teach objectively *about* religion without advocating or teaching any religious creed."³⁵⁹ Theologians "believe that the teachers of the American public school system are, on the whole, qualified to maintain free discussion with genuine respect for religious perspectives."³⁶⁰ The remedy for teacher abuse is to enjoin it or to get another teacher; it is not to outlaw the program.³⁶¹

Another objection leveled at the academic study of religion in the public schools is that since it is, by its nature, highly controversial, it is likely to engender serious antagonisms among students of the different religious faiths. Instances of this have been recorded.³⁶² It has been suggested that this matter of "divisiveness" should determine the constitutionality of governmental programs in the religious area.³⁶³ This seems to be neither a desirable nor workable approach to the problem. While this matter is unquestionably relevant to the legislative decision, once a genuinely secular-based program is enacted, it is difficult to see why it should be threatened with preordained abolition under the establishment clause either because some religious group finds it objectionable or because the sensibilities of some students will be offend-

358. See Note, 52 COLUM. L. REV. 1033, 1038 (1952); Note, 61 YALE L.J. 412-13 (1952).

359. EDUCATIONAL POLICIES COMM'N, NATIONAL EDUCATIONAL ASS'N, MORAL AND SPIRITUAL VALUES IN THE PUBLIC SCHOOL 77 (1951).

That religious beliefs are controversial is not an adequate reason for excluding teaching about religion from the public schools. Economic and social questions are taught and studied in the schools on the very sensible theory that students need to know the issues being faced and to get practice in forming sound judgments. Teaching about religion should be approached in the same spirit. General guides on the teaching of all controversial issues may be helpful. If need be, teachers should be provided with special help and information to equip them to teach objectively in this area.

Id. at 78.

360. Nichols, *Religion and Education in a Free Society*, in RELIGION IN AMERICA 148, 159 (Cogley ed. 1958).

361. See Lieberman, *A General Interpretation of Separation of Church and State and Its Implications for Public Education*, 33 PROGRESSIVE EDUCATION 129, 134 (1956); Note, 52 COLUM. L. REV. 1033, 1038 (1952).

362. PFEFFER & BAUM, PUBLIC SCHOOL SECTARIANISM AND THE JEWISH CHILD 34, 37 (1957).

363. See *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring opinion). See note 188 *supra*.

ed. If the governmental activity were a solely religious one that would likely result in the influencing or compromising of religious beliefs, the question should be answered differently, as has been maintained throughout this article. But many secular educational programs create dissention and discomfort among students.³⁶⁴ If the basis of this is due to religious conviction, the free exercise clause may afford individual relief.³⁶⁵

Some ardent religionists (and also, undoubtedly some avid non-religionists) have advocated the exclusion of all religious matter from the public school curriculum.³⁶⁶ This would mean, of course, that the study of European history would ignore the Protestant Reformation and the great religious controversies of the Middle Ages; that American history would be devoid of the struggle for religious freedom in the colonies; that art courses must exclude Da Vinci's "Last Supper" and Michelangelo's "Moses"; and that Beethoven's "Missa Solemnis" and Caruso's rendition of "Adeste Fidelis" could not be played in a music class. This line of reasoning might even prohibit the Bible from the public school library.

Despite the fact that one state court recently could find no difference between studies of this nature and devotional Bible reading,³⁶⁷ the distinction is quite obvious. The inclusion of that religious material that is an intrinsic part of other disciplines is vitally necessary to a well-rounded education and is, therefore, a secular act.³⁶⁸ It is thus subject to the same constitutional analysis as the objective study of religion. Unfortunately, from an *educational* standpoint, a recent study of American public education has revealed a "more or less deliberate avoidance of religious subject matter even when it was clearly intrinsic to the discipline concerned."³⁶⁹ Unfortunately, from a *constitutional* standpoint, the same study "found planned religious activities widely prevalent."³⁷⁰

364. See note 359 *supra*.

365. See note 354 *supra*.

366. See PFEFFER, *op. cit. supra* note 321, at 287; Johnson, *Religion and Education*, 33 PROGRESSIVE EDUCATION 143, 146 (1956).

367. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21, 32 (Fla. Sup. Ct. 1962). See also *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 290, 255 Pac. 610, 616 (1927).

368. See 25 CAL. OPS. ATT'Y GEN. 316, 325 (1955); Johnson, *supra* note 366, at 145.

369. Johnson, *Summary of Policies and Recommendations of the American Council on Education Committee on Religion and Education*, in THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL 5, 9 (Brown ed. 1958).

370. *Ibid.*

C. RELEASED TIME

Prior to the Supreme Court's decision on the Regents' prayer, the Court had decided only two other cases on the merits that concerned the question of religious penetration in the public schools. Both of these cases involved released time programs.³⁷¹ Such a program may be defined as "a system of religious education in connection with the public school under which those children desiring to participate in religious instruction are excused from their secular studies for a specified period weekly, while those children not participating in religious instruction remain under the jurisdiction and supervision of the public school for the usual period of secular instruction. No distinction is made in the use of the term between religious instruction classes held within or without the public school building; nor between classes held at the first or last period of the school day and those held sometime between these two periods."³⁷²

Under the proposed constitutional standard, all released time plans should be held in violation of the establishment clause. The only immediate purposes of such a program are to "encourage religious instruction"³⁷³ and to aid in the religious indoctrination of school children. In upholding the constitutionality of these programs, neither the Supreme Court³⁷⁴ nor the state appellate courts³⁷⁵ have denied this fact, nor have the many commentators

371. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

372. PFEFFER, CHURCH, STATE, AND FREEDOM 315 (1953). For a general history of the program, see *id.* at 313-27. Research has revealed one "first-hour-of-the-day" released time program which was said to be voluntary. Nonetheless, "no pupil . . . has refused or failed to attend such morning services for religious instruction." *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 359-60, 28 N.E.2d 256, 261-62 (1940).

373. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

374. *Ibid.*

375. *Gordon v. Board of Educ.*, 78 Cal. App. 2d 464, 178 P.2d 488 (Ct. App. 1947); *People ex rel. McCollum v. Board of Educ.*, 396 Ill. 14, 71 N.E.2d 161 (1947); *People ex rel. Latimer v. Board of Educ.*, 394 Ill. 228, 68 N.E.2d 305 (1946); *Zorach v. Clauson*, 278 App. Div. 573, 102 N.Y.S.2d 27 (1951), *aff'd*, 303 N.Y. 161, 100 N.E.2d 463 (1951); *People ex rel. Lewis v. Graves*, 219 App. Div. 233, 219 N.Y. Supp. 189 (1927), *aff'd*, 245 N.Y. 195, 156 N.E. 663 (1927); *Perry v. School Dist. No. 81*, 54 Wash. 2d 886, 344 P.2d 1036 (1959). Examination of those reported state trial court opinions that have sustained released time programs also bears out this contention. *Zorach v. Clauson*, 198 Misc. 631, 99 N.Y.S.2d 339 (Sup. Ct. 1950); *Lewis v. Spaulding*, 193 Misc. 66, 85 N.Y.S.2d 682 (Sup. Ct. 1948); *Lewis v. Graves*, 127 Misc. 135, 215 N.Y. Supp. 632 (Sup. Ct. 1926). Research reveals only one reported state case striking down a released time program. The grounds for the decision were that (1) since report cards were printed during school hours upon school presses, the state constitutional provision barring state aid to denomination-

who have defended these decisions. That a system of released time is inherently coercive, thereby compromising the students' freedom of religious choice, has already been mentioned and somewhat demonstrated above.³⁷⁶ Further evidence of its influencing and compromising nature is not lacking. The existence of compulsion has been found in the fact that religious leaders have so strenuously pressed for the establishment of released time systems.³⁷⁷ While this is not necessarily valid when measured by the strict rules of logic,³⁷⁸ it is nonetheless quite persuasive. Religious educators who are proponents of the system have noted that released time programs have a "remarkable evangelistic record,"³⁷⁹ for in those schools where they operate, a substantial percentage of students attend religious classes who would not otherwise do so.³⁸⁰ Religious leaders who oppose released time view it as "a means of applying public pressures to non-conformists so as to make them 'give in.'"³⁸¹ Schools with released time programs have reported "a considerable percentage of pupils in attendance whose parents do not belong to any church."³⁸² "They want to go to the church with their schoolmates and ask their parents to sign release cards."³⁸³ Where released time systems have been abandoned, attendance at religious classes has declined.³⁸⁴ Children of minority religious faiths have been known to enroll in the majority's religious classes because they did "not wish to be marked."³⁸⁵ The

al schools was violated and (2) the program violated the state education law's provision requiring public school attendance during the entire time of the school session. *Stein v. Brown*, 125 Misc. 692, 211 N.Y. Supp. 822 (Sup. Ct. 1925).

376. See text accompanying notes 102-04, 148 *supra*.

377. See PFEFFER, *op. cit. supra* note 372, at 373; Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 497 (1955).

378. Religious leaders may have any one of a multitude of reasons for seeking the establishment of the released time system, and even if their reason is that they believe the system is compulsive, that does not in fact make it true.

379. Dr. Erwin L. Shaver of the International Council of Religious Education, quoted in PFEFFER, *op. cit. supra* note 372, at 328.

380. *Ibid.* Dr. Shaver points out that before a released time system, half of the school population receives no religious training; when the system is instituted, an average of one-third of this neglected half is reached.

381. Glenn Archer, Executive Director of Protestants and Other Americans United, quoted in PFEFFER, *op. cit. supra* note 372, at 332.

382. JACKSON & MALMBERG, *RELIGIOUS EDUCATION AND THE STATE* 39 (1928).

383. Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 94 (1949).

384. See *id.* at 111.

385. PFEFFER & BAUM, *PUBLIC SCHOOL SECTARIANISM AND THE JEWISH CHILD* 19 (1957). See Record, p. 135, *Illinois ex rel. McCollum v.*

fact that some may not have done so in no way refutes the existence of the inherent pressure.³⁸⁶ Those who chose not to enroll, or who were forbidden by their parents from doing so, have told of being "ostracized by the other children in after-school activities."³⁸⁷

Examination of the reasoning utilized by those few who defend the constitutionality of released time by denying the presence of coercion is revealing. The Illinois Supreme Court, in *McCollum*, "proved" the nonexistence of any coercion by (1) saying that it was no more present there than it was in a prior, similar case, and (2) referring to some testimony by Terry's mother.³⁸⁸ The first reason, of course, merely avoids the issue, and aside from the fact that the quoted testimony failed to support the court's contention,³⁸⁹ there was overwhelming evidence to the contrary.³⁹⁰ Father Murray has taken the position that no threat to any personal rights was visible in *McCollum*,³⁹¹ Terry was not pressured into doing anything he did not want to do.³⁹² However, he then

Board of Educ., 333 U.S. 203 (1948), in which Terry McCollum's teacher testified that she spoke to Terry's mother about "the fact that allowing him to take the religious education course might help him to become a member of the group. He was not accepted as a member of our class. I thought if he did the same things that they were doing that might help."

386. The argument that this disproves the existence of coercion was made by Chief Judge Desmond, concurring in *Zorach v. Clauson*, 303 N.Y. 161, 176, 100 N.E.2d 463, 470 (1951).

387. Affidavit quoted in PFEFFER, *op. cit.* *supra* note 372, at 357.

When the released time students departed . . . I felt left behind. The released children made remarks about my being Jewish and I was made very much aware of the fact that I did not participate with them in the released time program. I endured a great deal of anguish as a result of this and decided that I would like to go along with the other children to the church center rather than continue to expose myself to such harassment. I asked my mother for permission to participate in the released time program and to accompany my Catholic classmates to their religious center, but she forbade it.

Id. at 356; *accord, id.* at 356-67. *Contra*, Corcoran, Social Relationships of Elementary School Children and the Released-Time Religious Education Program (unpublished doctoral dissertation in Stanford University Library), abstracted in 56 RELIGIOUS EDUCATION 363-64 (1961), concluding that the "degree of participation in the released-time program was not demonstrably related to the sociometric status of elementary school children."

388. *People ex rel. McCollum v. Board of Educ.*, 396 Ill. 14, 23, 71 N.E.2d 161, 165 (1947).

389. Mrs. McCollum had testified that, "I do not know it [released time] would bother him [Terry] one way or the other. I *did* not know it *until in court.*" *Ibid.* (Emphasis added.)

390. See, e.g., notes 103, 385 *supra*.

391. Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 24 n.7 (1949).

392. *Id.* at 39.

recognizes that there was "pressure by the school system in the interest of religious sects,"³⁹³ but justifies its existence by stating that the public schools' "sheer omission of religion from the curriculum is itself a pressure against religion,"³⁹⁴ and that "the system as such has become a formidable ally of secularism."³⁹⁵ This position may be refuted simply by denying the premises. As has been pointed out, the establishment clause does not demand that the public schools omit religion from their curriculum, nor does it forbid them from objectively educating children as to the important role religion plays and has played in our civilization and in others. And so long as the establishment clause forbids the indoctrination of pupils with the ideas that there is no God or that, if there is, His influence is unimportant,³⁹⁶ the public schools may not fairly be said to be allied with secularism.

While the Supreme Court did find the *McCollum* released time system in violation of the establishment clause, it sustained the program at issue in *Zorach v. Clauser*.³⁹⁷ The only significant difference between the cases, so recognized by the Court majority,³⁹⁸ was that in *McCollum* the public school classrooms were used for religious instruction, whereas in *Zorach* the religious classes were held away from the public school premises. It has already been shown that these cases cannot be meaningfully distinguished on the basis of the use of public property.³⁹⁹ It may be true that "if the location of the school building makes the trip to a church long or hazardous because of dangerous street crossings, attendance will be improved by securing permission to teach in the school building."⁴⁰⁰ But the fact that the system in *McCollum* may have more effectively promoted religious education does not mean that the *Zorach* plan did not promote it at all. It could be argued that the holding of the religious sessions in the same classrooms in which the ordinary daily school activities took place suggested that the religious instruction was an integral part of the public school program and, therefore, created a greater compulsive pressure on dissenters. This may make the result in *McCollum* more understandable, but it does not erase the "ineradicable built-in pressure to 'sign-up' for religious instruction"⁴⁰¹

393. *Ibid.*

394. *Ibid.*

395. *Ibid.*

396. See text accompanying note 318 *supra*.

397. 343 U.S. 306 (1952).

398. *Id.* at 315.

399. See text accompanying notes 129-47 *supra*.

400. Sullivan, *supra* note 383, at 94.

401. Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 574 (1961).

in *Zorach*. Even those who favor the result in *Zorach*⁴⁰² agree with those who do not⁴⁰³ that the decisions are irreconcilable on the matter of inherent coercion.

Probably the most frequently voiced argument in support of the constitutionality of released time is that its validity is dictated by the Supreme Court's landmark decision in *Pierce v. Society of Sisters*.⁴⁰⁴ That case held an Oregon statute requiring public school attendance for children of certain ages unconstitutional on the ground that the fourteenth amendment gives parents the right to direct the education of their children and, therefore, the right to send their children to private or parochial schools that meet state qualifications. One aspect of the argument is that the right recognized in *Pierce* was a right guaranteed by the free exercise clause of the first amendment; to deny the availability of religious instruction in the public schools to those parents who, for financial or other reasons, send their children there, is to confine this right "to parents who can afford to send their children to parochial or other private schools"⁴⁰⁵ The contention that rights protected by the free exercise clause would be suppressed by forbidding released time and other religious programs in the public schools has also been made by a number of others without the aid of the *Pierce* case.⁴⁰⁶

Apart from the question of whether *Pierce* really upheld a free exercise claim,⁴⁰⁷ the argument must fail. The shortest answer is that released time programs violate the establishment clause and that ends the matter. Although this point seemingly begs the question, it is strengthened by the fact that the two most articulate proponents of the free exercise argument recognize that the validity of their argument turns on whether the continued operation of re-

402. E.g., Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 839 (1954).

403. E.g., *Zorach v. Clauson*, 303 N.Y. 161, 187-88, 100 N.E.2d 463, 477 (1951) (Fuld, J., dissenting); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 77 (1961); Comment, 7 ALA. L. REV. 99, 107 (1954); Note, 52 COLUM. L. REV. 1033, 1038-39 (1952); Note, 61 YALE L.J. 405, 413-16 (1952); 74 HARV. L. REV. 611, 614 (1961); 31 TEXAS L. REV. 327, 329-30 (1953).

404. 268 U.S. 510 (1925).

405. Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3, 20 (1949).

406. E.g., *Zorach v. Clauson*, 303 N.Y. 161, 178, 100 N.E.2d 463, 471 (1951) (Desmond, J., concurring); *Zorach v. Clauson*, 198 Misc. 631, 636-37, 99 N.Y.S.2d 339, 344 (Sup. Ct. 1950); Harpster, *Religion, Education and the Law*, 36 MARQ. L. REV. 24, 53 (1952); Murray, *supra* note 391, at 33; Reed, *Church-State and the Zorach Case*, 27 NOTRE DAME LAW. 529, 540 (1952).

407. See Kurland; *supra* note 403, at 13-14; Pfeffer, *Released Time and Religious Liberty: A Reply*, 53 MICH. L. REV. 91, 93-94 (1954).

leased time programs infringes on the rights of anyone else.⁴⁰⁸ While it has not been contended that the program's imposition on nonconformists violates their rights specifically guaranteed by the free exercise clause,⁴⁰⁹ it has been amply shown that the system of released time does infringe on their conscientious scruples.

The more authoritative answer to the argument based on *Pierce* is that the Court has specifically rejected a similar free exercise contention. If the free exercise clause is not violated by a law that "simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive,"⁴¹⁰ a decision by the Court to uphold the establishment clause surely must not fail because it has this effect.⁴¹¹ It may be true that the rights guaranteed by *Pierce* would forbid a state from so regulating its public school system "as to make religious education or exercise impracticable or to limit such education or exercise to Saturday or Sunday"⁴¹² and would preclude a state from "the pre-empting of the whole of the child's time so as to leave no adequate part for religion."⁴¹³ Such regulation would effectively bar action "demanded by one's religion."⁴¹⁴ But, since no religion demands that its children be excused early from school to attend religious classes, the abolition of released time "does not make unlawful any religious practices"⁴¹⁵ At most, the denial of a released time program may be said to impose "only an indirect burden on the exercise of religion"⁴¹⁶ Clearly, neither the purpose nor the effect of the denial of a released time program "is to impede the observance of

408. *Zorach v. Clauson*, 303 N.Y. 161, 178, 100 N.E.2d 463, 471 (1951) (Desmond, J., concurring); Corwin, note 405 *supra*. See also Johnson, *Summary of Policies and Recommendations of the American Council on Education Committee on Religion and Education*, in *THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL* 5, 16-17 (Brown ed. 1958).

409. *But see* Pfeffer, *supra* note 407, at 96-97. See also 1 BAYLOR L. REV. 79, 81 (1948).

410. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

411. To adopt this free exercise rationale, see text accompanying note 405 *supra*, would be tantamount to saying that the free exercise rights of indigent Roman Catholics would be denied by the state's failure to provide free parochial schools.

412. Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73, 84-85 (1949).

413. PFEFFER, *op. cit.* *supra* note 372, at 289.

414. *Braunfeld v. Brown*, 366 U.S. 599, 604 (1961). Even here, the Court has stated that this is not an absolute test for determining free exercise clause violations. 366 U.S. at 605. See text accompanying notes 351-52 *supra*.

415. 366 U.S. at 605. See also Pfeffer, *supra* note 407, at 96.

416. 366 U.S. at 606. See also Note, 61 YALE L.J. 410-11 (1952).

one or all religions or is to discriminate invidiously between religions” If it were, the free exercise clause might be violated.⁴¹⁷ Rather, the purpose and effect is to prevent a violation of the establishment clause.⁴¹⁸ Since this “nonreligious” purpose would plainly be thwarted by any program of released time, under the standards set forth by the Supreme Court,⁴¹⁹ there is no credence to the contention that any person’s free exercise rights are denied by the exclusion of released time programs.⁴²⁰

Another aspect of the argument based on *Pierce* deals with the matter of compulsion. The rationale articulated by the Court in striking down the program in *McCullum* was that “the operation of the State’s compulsory education system . . . assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.”⁴²¹ The Court concluded that, by the system, “the State . . . affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State’s compulsory public school machinery. This is not separation of Church and State.”⁴²² The argument advanced is that if the *McCullum* plan was defective because it conditioned absence from the public school upon attendance at religious classes, then, *a fortiori*, the parochial school attendance upheld in *Pierce* is also constitutionally defective for precisely the same reason, for it permits children to satisfy the compulsory school attendance law by attending religious classes.⁴²³ Both arrangements produce attend-

417. See 366 U.S. at 607.

418. Cf. 366 U.S. at 609.

419. If the nonreligious purpose (preventing an establishment clause violation) could be accomplished by means that do not impose an indirect burden on religious observance (exclusion of released time programs may be said to impose such a burden, see text accompanying note 416 *supra*), the Court has indicated that failure to employ the alternative means would violate the free exercise clause. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

420. *Accord*, *Kauper*, *supra* note 402, at 848.

421. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 209–10 (1948).

422. 333 U.S. at 212.

423. See *Zorach v. Clauson*, 303 N.Y. 161, 173–74, 100 N.E.2d 463, 468–69 (1951); *Corwin*, *supra* note 405, at 20; Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROB. 61, 67–68 (1949); *Sullivan*, *supra* note 383, at 109; 22 SO. CAL. L. REV. 423, 440 (1949).

ance at religious classes by discharging parents from their obligation under the compulsory school provisions. "It is not merely fanciful or frivolous to suggest that [*Pierce*] . . . represents one hundred percent released time."⁴²⁴

This line of argument is not wholly unpersuasive. If *McCollum* were based on nothing more than the compulsory education law, it would seem to jeopardize *Pierce*. Or if the main thrust of *McCollum* were that truancy regulations were enforced by reports of attendance at religious classes being made to the public school⁴²⁵ and that "knowledge that an official record is kept of his attendance necessarily places pressure on the child—accustomed as he is to the discipline of school—to attend these religious classes,"⁴²⁶ then again the system upheld in *Pierce* might seem to be faulty.

But, even accepting the validity of these bases, the situations are distinguishable. Under the system of released time, the only alternative to remaining in the public school is to attend religious classes. This is not the case in the *Pierce* context. There, children who were excused from public school attendance had a broader range of alternatives; they could attend any accredited private school as well as parochial school.⁴²⁷ A true analogy between released time and the situation in *Pierce* would exist only if religious classes were but one of several desirable choices available to students.⁴²⁸ A school board program that would permit students to be released for a certain period of time each week on condition that they attend one of a group of extra-curricular education classes—for example, classes in music, art, religion, drama⁴²⁹—might well be valid under the establishment clause.⁴³⁰ Indeed, the reasoning of one noted commentator suggests that the exclu-

424. Kauper, *supra* note 402, at 841.

425. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 209 n.5 (1948).

426. *Zorach v. Clauson*, 303 N.Y. 161, 188, 100 N.E.2d 463, 477 (1951) (dissenting opinion).

427. The case itself was prosecuted by both a parochial school and a military training school.

428. Here, again, the question of legislative motive becomes relevant. See note 343 *supra*.

429. "Released time as now practiced had its origin in Gary, Indiana, in 1913 when the Superintendent of Schools directed the dismissal of children an hour earlier one day of each week to enable them to pursue their individual interests such as religion, music or art." Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387, 396-97 (1948).

430. The New York courts have upheld released time programs on this basis. *People ex rel. Lewis v. Graves*, 219 App. Div. 233, 239, 219 N.Y. Supp. 189, 195-96, *aff'd*, 245 N.Y. 195, 198, 156 N.E. 663, 664 (1927). See also Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 494 (1955).

sion of religious education as one of the alternatives would violate constitutionally protected religious freedom.⁴³¹ Most importantly in regard to the proposed constitutional standard, the difference that might make this program valid is that the provision of attractive alternatives to religious education would remove the inherently coercive element in released time. Students who were religious nonconformists and students with marginal beliefs would not be faced with the choice of either receiving religious instruction, which would compromise or influence their conscientious scruples, or being regarded as "oddballs."⁴³² They could join with those of their friends of the religious majority who preferred to study art, music, or drama rather than religion.⁴³³ It may be that by instituting such a program, more children would attend religious classes than would be the case otherwise. This is undoubtedly the result of the decision in *Pierce*.⁴³⁴ But, despite the fact that this represents aid to religion, the absence of coercion calls for a favorable constitutional judgment under the proposed constitutional standard. State action of this nature may be fairly characterized as merely an "accommodation."⁴³⁵

However, there is a more compelling distinction between the *Pierce* situation and released time, again based on compulsion. Regardless of the presence of alternative choices, no child of a minority religious faith (or of no faith at all) feels *compelled* to attend a parochial school simply because, under the *Pierce* case, the government must permit him to do so. But, in the released time situation, nonconforming pupils do feel compelled to accept religious instruction, thus compromising their conscientious beliefs.⁴³⁶ This last argument has been rejected on the ground that

431. Kurland, *supra* note 403, at 5.

432. Those children of minority religious faiths who choose to go home to receive religious instruction from their parents, a plan suggested by the counsel for the school board in *Zorach*, would be just as "oddballish" as those who were forced to remain in school because their parents had no religion to impart to them. See PFEFFER, *op. cit. supra* note 372, at 355.

433. In light of the fact that only about half of the public school population would accept religious education without a program of released time, see note 380 *supra*, if attractive alternatives to religious education were available to released students, it is most likely that many religious conformists would accompany the dissenters to the nonreligious classes.

434. It is obvious that if the Court had upheld the statute in *Pierce*, parochial school attendance would be diminished.

435. See text accompanying notes 463-72 *infra*.

436. It might be argued that by the Supreme Court's action in *Pierce*, removing any legal impediment to full time parochial education, the clergy was left free to exert strenuous pressures on their parishioners to send their children to parochial schools and that, in this way, governmental action resulted in private pressures being brought to bear on those

it "is based on the premise that the public school represents a kind of involuntary imprisonment, release from which may be effected by attending religious education classes,"⁴³⁷ and that it may not "be accepted as an unquestioned proposition of fact that religious instruction is so attractive and public school education so repressive that parents and children will invariably respond by choosing to escape the public school classroom."⁴³⁸ This is not the premise advanced here. The inherent compulsion does not necessarily arise from the unattractiveness of the public school, but from the urge of the nonconforming students, who would otherwise be left behind, to join the group. Thus, released time is a solely religious activity that is likely to result in compromising and influencing religious beliefs.

Of course, if it could be shown that in those schools that have adopted released time⁴³⁹ there is majority nonparticipation, it would be difficult to maintain that those students who remain behind will be considered "oddballs" by their colleagues. As a practical matter, it would seem that unless a large proportion of the school were "willing" to participate, the program would be discontinued.⁴⁴⁰ For the most part, the available statistics bear out the assumption that most children attend.⁴⁴¹ Those involved in the program have stated that "the enrollment of 90 to 99 percent of the public school constituency in the weekday church school is quite common. To reach less than 80 percent is the excep-

members of the faith with marginal convictions, thus influencing the freedom of religious participation; this then would be no different than that aspect of released time. This argument may be rebutted by pointing out that the *Pierce* decision was dictated by a serious free exercise claim: since the Roman Catholic religion demands that its children attend parochial schools, the Oregon statute was in direct conflict with the religious practice. See text accompanying notes 479-81 *infra*. It has already been pointed out that denial of released time presents no comparable free exercise claim. See generally text accompanying notes 410-20 *supra*. Thus, although released time must be characterized as a solely religious activity, the purpose of the decision in *Pierce* may be fairly characterized as "nonreligious."

437. Kauper, *supra* note 402, at 839.

438. *Ibid.*

439. A recent survey indicates that about 30% of American public schools have released time programs. Dierenfield, *The Extent of Religious Influence in American Public Schools*, 56 RELIGIOUS EDUCATION 173, 177 (1961).

440. In fact, this often happens. See PFEFFER, *op. cit. supra* note 372, at 336-37.

441. There appear to be no published national statistics on the percentage of participation in those schools that do have released time programs. See generally *id.* at 317-21.

tion."⁴⁴² Reports from such cities as Spokane, Washington,⁴⁴³ Champaign, Illinois,⁴⁴⁴ Salina, Kansas,⁴⁴⁵ and Van Wert, Ohio,⁴⁴⁶ confirm this. On the other hand, some schools in Berkeley, California,⁴⁴⁷ Mount Vernon, New York,⁴⁴⁸ Minneapolis,⁴⁴⁹ and Chicago⁴⁵⁰ report minority participation. Released time should nonetheless be invalid in most of those schools with minority participation because of the consequences of the unpleasant atmosphere that exists for those pupils, many of them members of the religious majorities, who remain. Educators have complained that one of the major problems involved in the administration of released time programs is what to do with the nonparticipants.⁴⁵¹ The dilemma facing them is that if special programs or normal educational activities are conducted, this in effect penalizes those who attend religious classes; on the other hand, it is unfair to the nonparticipants "to keep them occupied solely with 'busy' work."⁴⁵² If the latter course is taken, an unattractive environment is produced for those left behind, thereby influencing attendance at religious classes. Furthermore, if regular school courses are continued, although the religious school may be intrinsically no more attractive than the public school, it is likely that the mere opportunity to change environment and "escape from the classroom and school routine"⁴⁵³ will act as an incentive to students to go elsewhere. These being the less attractive alternatives available in the public schools, the solely religious program of released time will likely influence the student with marginal re-

442. Dr. W. Dyer Blair, Director of the Department of Weekday Religious Education of the International Council of Religious Education, in 1940, quoted in *id.* at 335.

443. "In most instances . . . there are but few children remaining." *Perry v. School Dist. No. 81*, 54 Wash. 2d 886, 889, 344 P.2d 1036, 1038 (1959).

444. See text accompanying note 103 *supra*.

445. 95%. JACKSON & MALMBERG, *op. cit. supra* note 382, at 50.

446. 81-96%. *Ibid.*

447. Just over 25%. See Nelson, *The Fourth "R" — Religion—In Education*, 51 RELIGIOUS EDUCATION 40, 41 (1956).

448. Over 25%. See Larson, *A Superintendent Looks at the Week-day School of Religion*, 51 RELIGIOUS EDUCATION 43 (1956).

449. Overall, about 50%. But individual schools vary from 12 to 94%. A majority of them are above 50%. Greater Minneapolis Council of Churches, *Comparison of Weekday Church School Enrollment with Public School Enrollment*, Nov. 13-17, 1961.

450. Less than 10%. See PFEFFER, CHURCH, STATE, AND FREEDOM 348 (1953).

451. See Nelson, *supra* note 447, at 41.

452. PFEFFER, *op. cit. supra* note 450, at 325.

453. Note, 52 COLUM. L. REV. 1033, 1038 (1952). See also Cushman, *supra* note 430, at 496.

ligious beliefs to attend religious classes—something he would not otherwise do.

The same cannot be said for a program of dismissed time, "the system under which, on one or more days, the public school is closed earlier [or opened later]⁴⁵⁴ than usual, and all children are dismissed, with the expectation—but not the requirement—that some will use the dismissed period for participation in religious instruction."⁴⁵⁵ It is no surprise, therefore, that there is general agreement, even among those who find released time unconstitutional, that dismissed time is valid.⁴⁵⁶ True, such a program will probably result in greater attendance at religious classes than would otherwise occur.⁴⁵⁷ Moreover, it might be demonstrated that the school board's purpose in early closing was solely religious.⁴⁵⁸ Nevertheless, the element of state-caused compulsion is absent. Students are not faced with the publicly imposed choice of either going to religious school or remaining behind in an unenticing setting. If they choose to attend religious classes, they will do so in preference to other equally alluring, and, in many cases, more than equally alluring, alternatives.⁴⁵⁹ Perhaps dissenters will nonetheless be subject to pressures from their conforming colleagues who choose to attend religious classes,⁴⁶⁰ but this would exist even if the schools closed at the regular hour. Unlike the case of released time, the coercion may not be attributed to governmental action.⁴⁶¹ The argument has been made that a

454. See *City of New Haven v. Town of Torrington*, 132 Conn. 194, 197, 43 A.2d 455, 457 (1945).

455. PFEFFER, *op. cit. supra* note 450, at 315.

456. *Zorach v. Clauson*, 303 N.Y. 161, 190, 100 N.E.2d 463, 478 (1951) (Fuld, J., dissenting); Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 354, 356 (1950); Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 93 (1949); Note, 52 COLUM. L. REV. 1033, 1039 (1952); Comment, 43 ILL. L. REV. 374, 386 (1948); 46 MICH. L. REV. 828, 829-30 (1948); 27 TEXAS L. REV. 256, 259 (1948); Note, 57 YALE L.J. 1114, 1119 (1948).

457. See Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 439 (1953).

458. A decision to hold the school picnic on Sunday *afternoon*, so as to enable those students who wish to go to church to do so, seems to have a solely religious purpose. But since this action does not inherently compel church attendance, it could not be said to violate the establishment clause under the proposed standard.

459. "[R]eligion can compete more successfully with arithmetic than with recreation." Note, 57 YALE L.J. 1114, 1119 (1948).

460. See generally 31 TEXAS L. REV. 329 (1953).

461. Query if the same could be said if the public school rented its premises for religious classes to commence immediately following the end of the public school day. Would not the coercive pressures here be attributable to the school board's action? See note 137 *supra*.

dismissed time plan "could not be used if the effect of the dismissal were to make the total time in school less than that required as compulsory attendance."⁴⁶² This would be irrelevant under the proposed constitutional standard because it has no bearing on the matter of compulsion. In any case, it is difficult to determine what merit the argument has since the required time for school attendance could easily be reduced.

There has been much discussion, particularly with reference to released time and other religious infiltration in the public schools, about the state's assuming a role of "neutrality" in this conflict and about the state's making an "accommodation" between the competing interests.⁴⁶³ While this may have an abstract appeal, it does not adequately substitute for analysis under a principled standard.⁴⁶⁴ The New York courts have upheld the constitutionality of the Regents' prayer⁴⁶⁵ and released time⁴⁶⁶ on this basis. Professor Kauper, a most articulate advocate for the constitutional validity of released time, agrees that it aids religion, but justifies it as a "reasonable accommodation."⁴⁶⁷ It is true that "in matters of public education due respect for the democratic process should

462. Cosway & Toepfer, *Religion and the Schools*, 17 U. CINC. L. REV. 117, 141 (1948).

463. See, e.g., 9 U.C.L.A.L. REV. 495, 501 & n.30 (1962) and authorities cited therein.

464. Professor Robert F. Cushman calls for "a doctrine of state neutrality." Cushman, *supra* note 430, at 490. He argues that "if all social groups, without regard to purpose, were allowed to come into the schools and conduct meetings which the students could attend, religious groups, since they are social groups, would be included." Perhaps so. But under this same principle, it would be valid for the Community Sandlot Baseball League, the Model Railroad Club (two of Cushman's examples, *id.* at 491), and the Roman Catholic Church (my example) to come into the public schools to proselytize for members. Professor Philip Kurland's "neutral principle of equality" would appear to call for the same result. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 4-5 (1961). Under the principle proposed in this article, the establishment clause would forbid the inclusion of the Church. There is nothing in the Constitution prohibiting the use of the public schools for Little League proselyting; the first amendment stands in the way of any religion doing the same thing. Nor would the prohibition violate the free exercise clause under any Supreme Court interpretation of it. At most, this would be "only an indirect burden on the exercise of religion." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). See generally text accompanying notes 415-20 *supra*.

465. *Engel v. Vitale*, 18 Misc. 2d 659, 694, 191 N.Y.S.2d 453, 491 (Sup. Ct. 1959).

466. *Lewis v. Spaulding*, 193 Misc. 66, 73, 85 N.Y.S.2d 682, 690 (Sup. Ct. 1948).

467. Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 841 (1954). See also Kauper, *Released Time and Religious Liberty: A Further Reply*, 53 MICH. L. REV. 233, 236 (1954).

permit some discretion to the community in shaping its educational policies,"⁴⁶⁸ and that "the interest of parents in the religious education of their children is a legitimate legislative concern."⁴⁶⁹ Dismissed time satisfies these appeals. Professor Kauper agrees that "no actual pressure [should be] placed on any student to attend classes in religious education."⁴⁷⁰ But he states that "a proper sense of concern for the non-participant does not require rejection of the [released time] program on constitutional grounds,"⁴⁷¹ since "it remains to be demonstrated that the optional released time privilege deprives anyone of [religious liberty]."⁴⁷² Hopefully, it has been demonstrated here.

1. *Excusing Children for Religious Holidays*

The argument has often been advanced⁴⁷³ that excusing children from the public schools for observance of their particular religious holidays is merely an "instance of released time but on a smaller scale,"⁴⁷⁴ and, therefore, this practice stands or falls with released time. But there are many distinguishing features. Released time is inherently coercive because it operates to single out the nonconformists *against their will* and compels them to attend religious classes *against their will*. When children are excused from classes on religious holidays, they *ask* to be singled out because they *wish* to attend religious services. Assuming that the public school act of excusing them has a solely religious purpose, the act is requested by the religious nonconformists themselves.

In the case of released time, majority participation works to coerce minority attendance. Minority participation usually results in the practice of excusing children for religious holidays since the public schools ordinarily close on the majority's religious holidays.⁴⁷⁵ However, for the same reasons that operated in the re-

468. Kauper, *Church, State, and Freedom: A Review*, *supra* note 467, at 839.

469. Kauper, *Released Time and Religious Liberty: A Further Reply*, *supra* note 467, at 236.

470. Kauper, *Church, State, and Freedom: A Review*, *supra* note 467, at 842.

471. *Ibid.*

472. Kauper, *Released Time and Religious Liberty: A Further Reply*, *supra* note 467, at 236. See also Katz, *supra* note 457, at 439.

473. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *Zorach v. Clauson*, 303 N.Y. 161, 173, 100 N.E.2d 463, 468 (1951); 20 *FORDHAM L. REV.* 328, 331 (1951); Brief for Intervenor-Respondents, p. 43, *Engel v. Vitale*, 370 U.S. 421 (1962).

474. Kauper, *Church, State, and Freedom: A Review*, *supra* note 467, at 840.

475. Professor Kurland would probably also distinguish these situations, but on other grounds. Since released time makes only religious education

leased time context, it may be that permitting children of religious minorities to be excused from the public school to attend religious services will likely influence students of these religious minorities with marginal beliefs to attend the church or synagogue of their faith.⁴⁷⁶ Nonetheless, the situations are distinguishable because, while it has been shown that there is no colorable claim that denial of released time infringes on rights under the free exercise clause,⁴⁷⁷ denying children of minority religious faiths their wish to attend holiday religious services does raise a serious free exercise question.⁴⁷⁸ Even those who have argued that the two situations are otherwise similar recognize this difference.⁴⁷⁹ Attendance at religious services is often an act demanded by one's religion. By the public schools' refusal to permit such attendance, the student faces the choice of either violating his religious principles or receiving whatever penalties the school chooses to impose. The Supreme Court has not held that, in a situation of this nature, the free exercise claim must prevail, but it has recognized that "in such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task."⁴⁸⁰ The free exercise claim here does appear to be quite substantial and persuasive because it can hardly be said that a student's action in absenting himself from school for one day is "in violation of important social duties or subversive of good order."⁴⁸¹ For

available, he would likely find it invalid because "it is . . . forbidden the state to confer favors [only] upon religious activity." Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961). Since pupils may be excused from the public schools for many reasons (e.g., funerals, dental appointments), he would likely say that the first amendment demands that they also be excused for religious holidays because "inhibitions [may] not be placed by the state on [only] religious activity." *Ibid.* However, it would seem that if the public school forbade absence for all extracurricular activities, Professor Kurland's thesis not only would permit the schools to deny excusing children for religious observances, but would actually forbid the schools from granting it. Since there is a substantial and persuasive, albeit not conclusive, free exercise argument for granting children absence from the public schools to observe their religious holidays, see text accompanying notes 478-81 *infra*, one might well disagree with this last point. See LOCKHART, KAMISAR & CHOPER, SUPPLEMENT TO DODD'S CASES ON CONSTITUTIONAL LAW 399 (1962).

476. Of course, if there is majority participation, inherent coercion will exist.

477. See text accompanying notes 414-20 *supra*.

478. See *Zorach v. Clauson*, 303 N.Y. 161, 191-92, 100 N.E.2d 463, 479 (1951) (Fuld, J., dissenting); Cosway & Toepfer, *Religion and the Schools*, 17 U. CINC. L. REV. 117, 141 (1948).

479. *Zorach v. Clauson*, 303 N.Y. 161, 173, 100 N.E.2d 463, 468 (1951); Kauper, *Church, State, and Freedom: A Review*, *supra* note 467, at 840, 848.

480. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

481. 366 U.S. at 603.

these reasons, the establishment clause may well permit a state to excuse children from school for religious observances despite the influence it may have on them and other pupils. No comparable "nonreligious" justification exists for released time.⁴⁸²

2. *Shared Time*

The newly adopted program of "shared time,"⁴⁸³ under which parochial school students come to the public schools each day to take certain secular classes, merits brief consideration. As presently constituted, the plan involves a relatively small number of Catholic students⁴⁸⁴ joining their public school associates for a few hours each day. There would seem to be no constitutional objection under the proposed constitutional standard in these circumstances, since the activity may not be characterized as being solely religious and it is unlikely that public school students will feel compelled to join their Catholic colleagues when the latter return to the parochial school.⁴⁸⁵

One might suggest that, since the experience over the years with released time has revealed teachers' persistent application of direct pressures on pupils to attend religious classes, despite the fact that teachers have been specifically prohibited from so doing,⁴⁸⁶ the program is inherently subject to abuse and, therefore, unconstitutional.⁴⁸⁷ However, we need not go this far. Despite the warning that "the critical constitutional issues with respect to released time cannot be solved by any play of language in using the word 'compulsion,'" ⁴⁸⁸ it is submitted that this solely religious activity should fail, principally for that reason.

D. TEACHERS WEARING RELIGIOUS GARB

Next to Bible reading, the issue involving religious infusion in the public schools probably most often brought before the state courts is whether the schools may employ teachers who wear religious garb.⁴⁸⁹ The reason commonly given for the invalidity of

482. Cf. note 436 *supra*.

483. Philadelphia Inquirer, Sept. 5, 1962, p. 25, col. 1.

484. About 10% of those in attendance in the public school. *Ibid*.

485. The question of whether this program constitutes unconstitutional financial aid to parochial schools is beyond the scope of this article.

486. For extensive documentation, see PFEFFER, CHURCH, STATE, AND FREEDOM 356-67 (1953); Note, 61 YALE L.J. 405, 412-13 (1952).

487. See Note, 52 COLUM. L. REV. 1033, 1038 (1952).

488. Kauper, *Released Time and Religious Liberty: A Further Reply*, 53 MICH. L. REV. 233, 236 (1954).

489. "A recent survey showed that members of religious orders in

this practice is that "the distinctive garbs, so exclusively peculiar to the Roman Catholic Church, create a religious atmosphere in the schoolroom. They have a subtle influence upon the tender minds being taught and trained by the nuns. In and of themselves they proclaim the Catholic Church and the representative character of the teachers in the schoolroom. They silently promulgate sectarianism."⁴⁹⁰

There is by no means the same general consensus on this point, however, as there is about those practices previously discussed. The pressures on the religiously nonconforming child that are created by his failure to join his colleagues in a particular activity are absent here. Nor can it be said here, as it was in connection with Bible reading, that by engaging teachers who wear religious garb, the state influences the student's freedom of conscientious choice by placing its "stamp of approval" on the Roman Catholic faith. It should be clear to students in the upper grades that when public school teachers are employed, the state approves only of their intellectual qualifications; the state does not endorse their sex, political beliefs, or religious affiliations any more than it sanctions the clothes that they wear or the street on which they live. As to those students in the lower grades, it would seem that any influence of the religious garb would not differ substantially from that produced by the pupils' knowledge of their teacher's religious devotion acquired elsewhere—from statements the teacher has made, from religious insignia the teacher wears, or from general community information.⁴⁹¹ The evidence that this practice is likely to compromise religious beliefs or influence conscientious choice is not very strong.

Even if the evidence were more convincing, the practice of permitting teachers to wear religious garb in the schools would not violate the establishment clause under the proposed constitutional standard unless it could be fairly characterized as solely religious. The practice has been defended on the ground "that to prohibit

religious garb were employed as teachers to some extent in the public schools of sixteen states and territories." Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73, 89 (1949).

490. *Rawlings v. Butler*, 290 S.W.2d 801, 809 (Ky. 1956) (dissenting opinion). See also *Zellers v. Huff*, 55 N.M. 501, 523-25, 236 P.2d 947, 963-65 (1951); *O'Connor v. Hendrick*, 184 N.Y. 421, 428, 77 N.E. 612, 614 (1906); *O'Connor v. Hendrick*, 109 App. Div. 361, 371-72, 96 N.Y. Supp. 161, 169 (1905); *Cosway & Toepfer, Religion and the Schools*, 17 U. CINC. L. REV. 117, 138 (1948); Comment, 22 U. CHI. L. REV. 888, 893-94 (1955).

491. See *Hysong v. Gallitzin Borough School Dist.*, 164 Pa. 629, 657, 30 Atl. 482, 484 (1894); Harpster, *Religion, Education and the Law*, 36 MARQ. L. REV. 24, 54-55 (1952).

a teaching Sister from wearing the garb would infringe the free exercise of religion."⁴⁹² If this premise is valid, it would seem to be a "nonreligious" justification for the practice. However, while it is quite clear that the Constitution prohibits state discrimination against its employees on the basis of religion,⁴⁹³ it is not clear that the free exercise clause requires the state to permit its teachers to do anything that their religion demands.⁴⁹⁴ Aside from the fact that barring teachers who wear religious garb from the public schools would constitute only a rather minor disability,⁴⁹⁵ there is some indication that Catholic Sisters may receive dispensation to wear lay clothing while teaching in the public schools.⁴⁹⁶ These being the facts, if further research revealed that the wearing of religious garb was likely to act as a compromising or influencing factor, it seems doubtful that the free exercise clause could be read to prohibit a state from barring religious garb from the public schools.⁴⁹⁷ If this be true, the wearing of the garb in the schools might fairly be characterized as a solely religious practice.

In any case, if it is found that the practice is influential or coercive, it may be that the establishment clause is violated despite the activity's arguably secular foundation. The secular objective (qualified teachers) may be attained just as well by employing those who do not wear religious garb and, by so doing, the objectionable effects would be eliminated.⁴⁹⁸ As of now, the factual premises remain unproven.

The fact that Roman Catholic Sisters contribute their net income from public school teaching to the church should have no bearing whatever on the constitutional validity of the practice.⁴⁹⁹ Persons should be able to spend their income for any legal purpose. In fact, the argument may well be made that "to deny the right to make such contribution would in itself constitute a denial of that right of religious liberty which the Constitution guarantees."⁵⁰⁰

492. Fahy, *supra* note 489, at 90. *But see* Commonwealth v. Herr, 229 Pa. 132, 78 Atl. 68 (1910); Comment, 22 U. CHI. L. REV. 888, 894 (1955).

493. See Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952); United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947).

494. Query if the state could not bar a teacher whose religious faith required that she proselyte while teaching. See Harfst v. Hoegen, 349 Mo. 808, 816, 163 S.W.2d 609, 614 (1942).

495. See text accompanying note 410 *supra*.

496. It has been granted in New York and North Dakota. AMERICAN CIVIL LIBERTIES UNION, 41ST ANNUAL REPORT 28-29 (1961).

497. See generally Braunfeld v. Brown, 366 U.S. 599, 603-07 (1961).

498. See text following note 346 *supra*.

499. Rawlings v. Butler, 290 S.W.2d 801, 806 (Ky. 1956); Zellers v. Huff, 55 N.M. 501, 522, 236 P.2d 949, 961-62 (1951); Hysong v. Gallitzen Borough School Dist., 164 Pa. 629, 656-57, 30 Atl. 482, 483-84 (1894).

500. Gerhardt v. Heid, 66 N.D. 444, 460, 267 N.W. 127, 135 (1936).

The whole discussion of this subject has dealt only with the single practice of teachers wearing religious garb. The result suggested here may be different if the totality of the circumstances in the public school environment, of which the teacher's attire is merely one element, is likely to compromise or influence the conscientious convictions of the students.⁵⁰¹

E. DISTRIBUTION OF BIBLES

In a recent survey of over 2,000 public school superintendents throughout the country, over 40 percent admitted that the distribution of Gideon Bibles to students was permitted through their schools.⁵⁰² This practice is unquestionably solely religious,⁵⁰³ and the only two cases considering the problem that have reached the appellate level have found it to be in violation of the establishment clause.⁵⁰⁴

There should be no dispute that the King James version of the Bible, which is the version distributed by the Gideons, is objectionable to a large number of religious faiths, and that the scruples of Roman Catholic children will be compromised by receipt of a copy.⁵⁰⁵ However, one might agree that this activity is, at best, mildly compulsive on the objectors as compared with some of those programs previously discussed.⁵⁰⁶ Consider the situation in *Engel*; it would seem much less likely that a child, during the prayer recitation, would leave the room to stand outside with nothing to do,⁵⁰⁷ than that he would decline acceptance of a Bible. This would seem particularly true when the procedures for acquisition of the Bible were carefully drafted so as to avoid the singling

501. See Note, 22 U. CHI. L. REV. 888, 890 (1955); text accompanying notes 560-63 *infra*.

502. Dierenfield, *The Extent of Religious Influence in American Public Schools*, 56 RELIGIOUS EDUCATION 173, 175 (1961).

503.

The Gideons International is a nonprofit corporation . . . whose object is "to win men and women for the Lord Jesus Christ, through . . . (c) placing the Bible—God's Holy Words—or portions thereof in hotels, hospitals, schools, institutions, and also through the distribution of same for personal use."

Tudor v. Board of Educ., 14 N.J. 31, 33, 100 A.2d 857, 858 (1953).

504. Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. Dist. Ct. App. 1960); Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953).

505. See text accompanying note 271 *supra*.

506. See Levy, *Views From the Wall—Reflections on Church-State Relationships*, 29 HENNEPIN LAW. 51, 55-56 (1961).

507. In fact, no child requested such permission although it had been provided for. Brief for Petitioners, p. 31, *Engel v. Vitale*, 370 U.S. 421 (1962).

out of nonconformists.⁵⁰⁸ Nonetheless, there has been expert testimony that the program, as administered, generated pressures to conform.⁵⁰⁹ If this factual premise remains unshaken, under the proposed constitutional standard the practice must cease.

F. SCHOOL CREDIT FOR OUTSIDE RELIGIOUS INSTRUCTION

It has been reported that "in a number of communities the public school—generally at the high school level—will give credit toward graduation for religious instruction obtained after public school hours or during week ends under the auspices of the child's church."⁵¹⁰ The purpose and effect of this program—sectarian indoctrination—is solely religious. If those students who do not participate will have to spend extra time in the public school acquiring these credits while the participants are dismissed, this program is no different from released time. Nonparticipants will be conspicuous and, if in the religious minorities, will be subject to pressures to compromise their beliefs. If there is only minority participation, the opportunity to avoid public school routine will likely influence free religious choice. But despite the unquestioned aid that religion would receive, these results would not follow if the public school arranged its schedule so that all students, regardless of whether they participated in outside religious classes, remained in school during the entire school day. Furthermore, if the school were to give credit for a number of extra-curricular educational courses that were of generally equal attractiveness, all pressures and incentives would seem to be removed, and the program should pass the proposed constitutional standard.

The fact that some time of public school administrators and teachers may be taken in insuring that the instruction is being taken by the students and being given by qualified personnel must be excused as *de minimis*.⁵¹¹ However, if the public schools insist on examining and grading the students on the basis of what they have learned,⁵¹² the program should probably be invalid. In such cases, pupils whose religious beliefs differ from those of the public school teacher will very likely be tempted to learn what they

508. In *Tudor*, parents simply had to sign a permission slip. Children whose parents had signed reported to a room "at the close of the session." No other students were present. No reason was to be stated when the announcement calling the students was made. 14 N.J. at 34-35, 100 A.2d at 858-59.

509. 14 N.J. at 50-52, 100 A.2d at 867-68.

510. PFEFFER, CHURCH, STATE, AND FREEDOM 305 (1953).

511. See text accompanying notes 141-47 *supra*.

512. Cf. *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 Pac. 35 (1918).

believe will be generally acceptable or at least to assert this for examination purposes. Such a compromising element should be barred.

G. BACCALAUREATE AND GRADUATION

Baccalaureate exercises, under public school auspices, are widespread⁵¹³ and have divided communities "with bitter conflict and tension."⁵¹⁴ Many of these programs are "occasions to impart spiritual truths"⁵¹⁵ and ordinarily include all the elements of a Protestant church service—processional hymn, invocation prayer, choral hymns, Bible reading, address by a clergyman, benediction prayer, and recessional hymn.⁵¹⁶ These must be fairly characterized as solely religious activities whether the service is held on public school or church property. Certain faiths, particularly the Roman Catholic, forbid participation in exercises of this kind.⁵¹⁷ Although nonparticipation is often permitted,⁵¹⁸ it would likely be ineffective as far as inherent compulsion is concerned for reasons previously discussed.⁵¹⁹ Thus, since participation would directly compromise some students' religious scruples, the establishment clause would be violated under the proposed constitutional standard.⁵²⁰ Of course, this would neither bar the individual churches from conducting baccalaureate services for members of their own faith nor prevent the public schools from having a nonreligious assembly program that is called a baccalaureate.

513. Almost 87% of school superintendents polled stated that the activity was engaged in in their school systems. Dierenfield, *The Extent of Religious Influence in American Public Schools*, 56 RELIGIOUS EDUCATION 173, 175 (1961).

514. Boyer, *Religious Education of Public School Pupils in Wisconsin*, 1953 WIS. L. REV. 181, 196.

515. Sample comment by public school supervisor, quoted in Dierenfield, *supra* note 513, at 179.

516. See PFEFFER, CHURCH, STATE, AND FREEDOM 418 (1953). See also Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 573 (1961).

517. Boyer, *supra* note 514 at 196, 205.

518. See *Chamberlin v. Dade County School Bd.*, 17 Fla. Supp. 183, 197 (Cir. Ct. 1961). However, in West Virginia and Pennsylvania, recent instances are reported in which nonparticipating Catholic students were denied public awarding of their diplomas. See AMERICAN CIVIL LIBERTIES UNION, 37TH ANNUAL REPORT 64 (1957); PFEFFER, *op. cit. supra* note 516, at 420.

519. However, it may be argued that the pressures on a nonconforming student to attend a single program are virtually nonexistent, especially when compared to the pressures generated to participate in an activity that occurs every day or once each week.

520. An opinion of the Attorney General of the state of Washington, April 20, 1962, agrees. See Jurisdictional Statement, p. 18, *Chamberlin v. Dade County Bd. of Pub. Instruction*, appeal docketed, 31 U.S.L. WEEK 3139 (U.S. Oct. 15, 1962)(No. 520).

There have been several reports of public schools conducting their graduation exercises in church buildings.⁵²¹ If this were the only available site for the occasion,⁵²² it would be difficult to argue that this is a solely religious practice. Moreover, if this be the fact, the alternative argument for establishment clause violation is likewise inadmissible;⁵²³ despite any religious objections to the practice, the secular objective of having a suitable building may not be attained by alternative means.

Graduation invocations delivered by clergymen present a somewhat different problem. This part of the graduation program must be considered as solely religious despite efforts to make it nonsectarian. But there are several reasons why this program may be defended under the proposed constitutional standard. Research has not revealed that listening to the invocation is contrary to anyone's religious or conscientious beliefs. If this is true, the practice could not possibly result in compromising any student's conscientious scruples. And even if there were some objection, the atmosphere is not conducive to inherent compulsion to attend the invocation. The dissenting pupil need not absent himself from the entire program, and he will likely have the comfort of his parents' and relatives' presence and will be in the midst of many people outside his peer group.⁵²⁴ Finally, the fact that this is but a small segment of a program that a student attends but once makes fairly unpersuasive the "stamp of approval" argument for influencing religious beliefs advanced in connection with daily religious exercises in public school classes.⁵²⁵

H. RELIGIOUS INSIGNIA

A North Dakota statute requires "a placard containing the ten commandments of the Christian religion to be displayed in a conspicuous place in every schoolroom, classroom, or other place where classes convene for instruction."⁵²⁶ Not long ago, a New York school board passed a resolution that a neutral version of the Ten

521. See *State ex rel. Conway v. District Bd.*, 162 Wis. 482, 156 N.W. 477 (1916); AMERICAN CIVIL LIBERTIES UNION, 34TH ANNUAL REPORT 51 (1954).

522. See *Miller v. Cooper*, 56 N.M. 355, 244 P.2d 520 (1952).

523. See text following note 346 *supra*.

524. The situation has been accurately compared to an opening of Congress or a presidential inauguration. Committee on Religion and Public Education of the National Council of the Churches of Christ, *Relation of Religion to Public Education—A Study Document*, International J. of Religious Education, Apr. 1960, pp. 21, 29.

525. See *State ex rel. Conway v. District Bd.*, 162 Wis. 482, 495, 156 N.W. 477, 481 (1916).

526. N.D. CENT. CODE § 15-47-10 (1960).

Commandments, amalgamating and modifying the Jewish, Catholic, and Protestant versions, be placed in each classroom.⁵²⁷ There has been a proposal in Massachusetts to place the words "In God We Trust" in every public schoolroom.⁵²⁸ All of these practices must be fairly characterized as solely religious,⁵²⁹ and all of these mottoes undoubtedly would be found violative of someone's conscientious scruples.⁵³⁰ Aside from the fact that they arguably violate the establishment clause because they involve a measurable and perhaps substantial expenditure of public funds solely in aid of religion,⁵³¹ it would seem that they would also fail under the standard proposed herein.

The identification of the public schools with these religiously oriented mottoes,⁵³² constantly in view of immature students with malleable minds and highest regard for the public school institution, is likely to result in influencing or compromising their religious beliefs.⁵³³ This should be contrasted with the placing of a Christmas creche on the public school lawn that "was not erected or displayed while school was in session"⁵³⁴ and where "no public funds were expended, nor was the time of any public employee involved in its erection or display."⁵³⁵ The compromising or influencing potential here seems minimal indeed, as it probably also would if the creche were displayed within the school for a few days while classes were in session.⁵³⁶

527. See Note, 22 ALBANY L. REV. 156 (1958).

528. See AMERICAN CIVIL LIBERTIES UNION, 37TH ANNUAL REPORT 64 (1957).

529. The announced purpose of the New York program "was to strengthen the moral and spiritual values of the students in the school district." See Note, 22 ALBANY L. REV. 156 (1958).

530. See *ibid.* Note that those theses that propose "neutrality" as the constitutional determinant would seem to permit all of these since there is no constitutional bar to other symbols such as the American or state flag or the sign of the Red Cross or Heart Fund. Indeed, this analysis might well permit the permanent erection of a Crucifix or Star of David or of any extremely sectarian motto. See note 464 *supra*.

531. See note 182 *supra*; 3 N.D. CENT. CODE § 15-47-10 (1960): "The superintendent of public instruction may cause such placards to be printed and may charge an amount therefor that will cover the cost of printing and distribution."

532. Cf. Note, 49 COLUM. L. REV. 836, 840 (1949).

533. See text accompanying notes 243-46, 291-94 *supra*.

534. *Baer v. Kolmorgen*, 14 Misc. 2d 1015, 1019, 181 N.Y.S.2d 230, 236 (Sup. Ct. 1958).

535. *Ibid.*

536. See AMERICAN CIVIL LIBERTIES UNION, 39TH ANNUAL REPORT 39 (1959).

I. FLAG PLEDGE AND PATRIOTIC SONGS

In 1954, Congress amended the pledge of allegiance to the flag to include the words "under God." Whether as a general matter this is unconstitutional is not the question to be considered here. Rather, the issue is whether a school board's requirement that the pledge be stated each day in the public schools violates the establishment clause. This is a difficult question when measured by the proposed constitutional standard. If the only purpose and effect of the inclusion of these words is to have the student recognize the existence of God and to inculcate religious beliefs, then the words should be stricken for reasons previously examined. However, it could be argued that this activity is not solely religious; that, unlike the Regents' prayer that required an invocation of the Deity and a supplication to God,⁵³⁷ the flag pledge merely requires the recitation of an historical fact—that this nation was believed to have been founded "under God" and that most of our people currently believe this still to be the case. The recitation of the flag pledge would then be no different from the recitation of Lincoln's Gettysburg Address which, while involving the mention of God, does not demand that the student swear allegiance to Him but merely requires the student to learn American history. On this characterization, the activity is secular, and, under the proposed standard, the establishment clause would not demand its exclusion. If some student's conscientious beliefs forbid participation,⁵³⁸ the free exercise clause demands that he be excused.⁵³⁹ The fact that he may be inherently compelled to participate is unfortunate but irrelevant.⁵⁴⁰

Even accepting this line of argument, the issue may not be fully resolved. The distinction presented is exceedingly subtle, very likely too fine to be perceived by even an above-average student. There is little doubt that the inclusion of the words "under God" in a daily school exercise will result in compromising of some students' conscientious scruples. Therefore, the argument that the establishment clause is violated because the state may accomplish its secular purpose—teaching students that the founding fathers and

537. "The 'Regents prayer' is an acknowledgement of our dependence upon Almighty God and a petition for the bestowal of His blessings." *Engel v. Vitale*, 10 N.Y.2d 174, 180, 176 N.E.2d 579, 581 (1961).

538. Objections have been raised. See *Lewis v. Allen*, 5 Misc. 2d 68, 159 N.Y.S.2d 807 (Sup. Ct. 1957), *aff'd*, 11 App. Div. 2d 447, 207 N.Y.S. 2d 862 (1960).

539. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

540. See text accompanying notes 118–26 *supra*.

most citizens believe that this nation exists under God—just as effectively by less obtrusive means is quite forceful.⁵⁴¹

An even closer question is presented by the public school activity of singing certain songs as part of the daily opening exercises. Some very popular patriotic compositions, such as "God Bless America" and the final stanza of "America,"⁵⁴² undeniably involve supplications to the Deity. This is probably true also of any number of songs. Nevertheless, it seems fair to contend that neither the purpose nor the effect of these is solely religious; the thrust of these songs is to instill love of country and not love of God. This argument becomes even more persuasive when the entire content and spirit of the remaining parts of the opening exercises is nonreligious. Perhaps this argument stretches the principle a bit. But even ardent separationists agree that this activity is secular.⁵⁴³ Therefore, while the free exercise clause may demand the right of nonparticipation for students whose scruples forbid them from taking part, under the proposed standard, the establishment clause does not forbid the practice. The alternative position for establishment clause violation may also be satisfied by the contention that, since these songs have become something of an American tradition, it is doubtful that the state's secular purpose may be achieved *just as effectively* with their elimination. As to the third stanza of "The Star-Spangled Banner,"⁵⁴⁴ the analysis above is even more forceful, especially since the words do not involve an invocation to God but are more like the recitation of historical facts.

J. HOLIDAY OBSERVANCE

The commemoration of certain religious holidays is a very com-

541. See text following note 346 *supra*.

542.

Our fathers' God! to Thee
Author of Liberty,
To Thee we sing;
Long may our land be bright
With freedom's holy light;
Protect us by Thy might,
Great God, our King!

543. See Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735, 750 (1962); cf. McCluskey, quoted in *THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL* 25 (Brown ed. 1958). See also Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 38 (1962).

544.

Blest with victory and peace, may the heav'n rescued land
Praise the Power that hath made and preserved us a nation!
Then conquer we must, when our cause it is just,
And this be our motto—"In God is our Trust."

mon public school practice.⁵⁴⁵ Many of the forms that this takes may not be fairly characterized as solely religious. Nor do many of these practices lend themselves to student participation. The presence of these two factors would clearly preclude an establishment clause violation under the proposed principle. Thus, the placing of a Christmas tree or an Easter bunny in the public school has virtually no religious significance and, even if it did, its short lived presence, combined with its scant religious import, would seem to have minimal effect.

The singing of religious songs and the staging of religious pageants are entirely another matter. While the tenor of some holiday songs (for example, "White Christmas" and "Jingle Bells") and of some plays (for example, Dickens' "Christmas Carol") is quite clearly associated with our people's culture rather than with their religious beliefs,⁵⁴⁶ this cannot fairly be said of those whose language and purport is Christological, devotional, or otherwise religious. The evidence of the inherent compulsion on members of religious minorities to participate in these songs and pageants is substantial. At a school *in which Jewish children were in the majority*, a sixth grade pupil asked to be excused from the singing of Christmas hymns;⁵⁴⁷ after class, she "was belabored by her classmates with such epithets as 'Christ-killer who refuses to sing hymns to Jesus Christ.'"⁵⁴⁸ In reaction to or in anticipation of such occurrences, "many Jewish children, with the blend of ingenuousness and ingenuity natural to their age, . . . often engage in one or another subterfuge to produce the appearance of cooperation in the school celebration without at the same time genuinely participating in violation of their religious convictions."⁵⁴⁹ The emotional ambivalence

545. A recent study showed that Christmas was celebrated in 88% of the public schools polled; Easter, 58%; Hanukkah, 5%; Passover, 2%. Dierenfield, *The Extent of Religious Influence in American Public Schools*, 56 RELIGIOUS EDUCATION 173, 176-77 (1961).

546. THE AMERICAN COLLEGE DICTIONARY 214 (Barnhart ed. 1959) gives, as a definition of Christmas: "Dec. 25 (Christmas Day), now generally observed as an occasion for gifts, greetings, etc." See also PFEFFER, CHURCH, STATE, AND FREEDOM 407 (1953); Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 573 (1961).

547. Cf. PFEFFER, *op. cit. supra* note 546, at 406:

Nor can any non-Jew rightfully assert that such singing ["Come, let us adore Him, Christ the Lord," or "Born is the King of Israel"] will not violate the Jewish child's religious conscience, any more than the school principals in the 19th century could rightfully assert that the Catholic child's religious conscience would not be violated by reading from the King James Bible.

548. *Id.* at 407.

549. PFEFFER & BAUM, PUBLIC SCHOOL SECTARIANISM AND THE JEWISH CHILD 6 (1957). See examples cited *id.* at 7-9; Franck, quoted in

that this produces is quite obvious. No doubt, many less determined children fully sacrifice their religious scruples by joining their colleagues. These solely religious activities that require student participation, whether it be the singing of hymns or the acting in plays, are likely to result in compromising conscientious convictions.⁵⁵⁰ Nor is the practice validated under the establishment clause by celebrating the holidays of a greater number of religious faiths. Since religious leaders of all faiths have objected to this,⁵⁵¹ it would only seem to compound the difficulty.

Nothing that has been said would deter examination, in the public school curriculum, of certain aspects of religious holidays as an academic matter. Thus, the singing and learning of religious hymns in a music class, as part of the study of different types of musical compositions, must be fairly characterized as secular activity.⁵⁵² Likewise, the occasional showing of motion pictures that depict various religious happenings may be of considerable educational value,⁵⁵³ and, even if not, the quantum of participation required would be so slight that it is unlikely that the compromising or influencing of conscientious scruples would occur. This last instance is to be contrasted with a public school group activity of making religious cut-outs to be pasted on the schoolroom windows and walls.⁵⁵⁴ Here, the element of inherent compulsion seems quite powerful, and under the proposed constitutional standard, *if the children were required to make only religiously significant pictures*, and this practice were contrary to their religious beliefs, the establishment clause would be violated.

K. PUBLIC SCHOOLS IN PAROCHIAL BUILDINGS

In a small percentage of school districts throughout the country, public school classes are held in church owned buildings.⁵⁵⁵

THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL 60 (Brown ed. 1958); Gilbert, *A Catalogue of Church-State Problems*, 56 RELIGIOUS EDUCATION 424, 429 (1961).

550. *But see* Levy, *Views From the Wall—Reflections on Church-State Relationships*, 29 HENNEPIN LAW. 51, 56 (1961).

551. *See* PFEFFER, *op. cit. supra* note 546, at 410–12; AMERICAN CIVIL LIBERTIES UNION, 41ST ANNUAL REPORT 27–28 (1961).

552. *See* Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735, 750 (1962).

553. *But see* Chamberlin v. Dade County School Bd., 17 Fla. Supp. 183, 196 (Cir. Ct. 1961).

554. *Cf.* Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1344 (1949).

555. Dierenfield, *The Extent of Religious Influence in American Public Schools*, 56 RELIGIOUS EDUCATION 173, 177 (1961), reports almost 8%.

This practice has spawned a good deal of litigation in the state courts. If the practice involves no more than the school board's renting the only available property,⁵⁵⁶ it may hardly be fairly characterized as solely religious. Thus, there would be no violation of the establishment clause, either under the proposed constitutional standard or under the alternative test previously discussed.⁵⁵⁷ The fact that the school rooms have religious pictures and decorations⁵⁵⁸ would possibly not alter these conclusions, despite the fact that their placement in an ordinary public school would be objectionable; if, irrespective of the religious decor, the church building is still found to be the best available space, the issue is entirely different.⁵⁵⁹ It may be reasonably argued that no matter how great the amount of religious infusion in the environment due to quasi-control by the church, the school board's practice of using parochial buildings cannot be said to be solely religious, either in purpose or in effect; in each instance, it is the considered judgment of the public school board that, on balance, these are the best available facilities for public education. Perhaps this would immunize the practice under the proposed standard.

This may not be the case in regard to the alternative criterion for establishment clause violation. It is ultimately the function of the Court to determine whether "on balance, these are the best available facilities" and whether the secular end may not be attained by less objectionable means. It has been suggested that the solution here is: "that which is legally tolerable ends where the religious infusion becomes unreasonably great."⁵⁶⁰ But certain guidelines may be established. Public officials should not be permitted to abdicate their responsibility of selecting teachers and textbooks to clerical authorities.⁵⁶¹ The potentiality for unchecked religious indoctrination of public school students in these cir-

556. See *Rawlings v. Butler*, 290 S.W.2d 801, 806-07 (Ky. 1956).

557. See text accompanying note 523 *supra*.

558. See *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 359, 28 N.E.2d 256, 261 (1940).

559. This line of argument assumes, of course, that the pictures and decorations are there without the consent of the public school officials. If they had control over these matters, then the retention of these decorations could be accurately described as a solely religious activity.

560. Sutherland, *Public Authority and Religious Education: A Brief Survey of Constitutional and Legal Limits*, in *THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL* 33, 43 (Brown ed. 1958).

561. See *Millard v. Board of Educ.*, 121 Ill. 297, 301, 10 N.E. 669, 671 (1887); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 358, 28 N.E.2d 256, 261 (1940); *Berghorn v. Reorganized School Dist.*, 364 Mo. 121, 130, 260 S.W.2d 573, 576 (1953). Compare *Crain v. Walker*, 222 Ky. 828, 839, 2 S.W.2d 654, 659 (1928).

cumstances would seem so great⁵⁶² that no justification for it should be held acceptable, perhaps even if the result is tantamount to the temporary suspension of the so-called "public" education. The same, of course, must be said if the result of the use of the parochial buildings is compulsory religious teaching.⁵⁶³ In such cases, the Court should find that alternative means (for example, construction of an independent public school building or arranging for public education in another school district) must be used to accomplish the secular end of providing a public education. Even if the Constitution permits the use of public funds to aid parochial education, this is no authority for the proposition that the state may demand that children of all faiths who wish a "public education" attend a publicly supported institution that is essentially no different from a parochial school.

On the other hand, if the unalterable consequences of using church property for public education are that the schools, granting the right of nonparticipation, engage in certain solely religious practices such as prayers and worship in daily chapel exercises⁵⁶⁴ or programs of religious instruction akin to released time,⁵⁶⁵ the Court should place a heavy burden on the state to demonstrate that less objectionable means do not exist. Otherwise, all the protections afforded religious liberty in the public schools that have been discussed may be easily circumvented by turning over some of the control of public education to the clergy of a particular religious faith.⁵⁶⁶

562. See, e.g., *Knowlton v. Baumhover*, 182 Iowa 691, 703, 166 N.W. 202, 206 (1918); *Harfst v. Hoegen*, 349 Mo. 808, 811, 163 S.W.2d 609, 610 (1942); *Zellers v. Huff*, 55 N.M. 501, 506, 236 P.2d 949, 952 (1951); *Boyer, Religious Education of Public School Pupils in Wisconsin*, 1953 WIS. L. REV. 181, 217-225.

563. See cases cited note 562 *supra*.

564. See *Williams v. Board of Trustees*, 172 Ky. 133, 134, 188 S.W. 1058 (1916); *Berghorn v. Reorganized School Dist.*, 364 Mo. 121, 131-32, 260 S.W.2d 573, 577-78 (1953).

565. See *Millard v. Board of Educ.*, 121 Ill. 297, 302, 10 N.E. 669, 671 (1887); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 359, 28 N.E.2d 256, 261-62 (1940); *Zellers v. Huff*, 55 N.M. 501, 507-08, 236 P.2d 949, 953 (1951); *Boyer, supra* note 562.

566. Cf. *Knowlton v. Baumhover*, 182 Iowa 691, 725-26, 166 N.W. 202, 213 (1918):

[W]henver the adherents of any particular creed can command a majority of any school board, it may abandon the schoolhouse provided for the common and equal use of all the people, move the school into some church or some parochial or private building established for sectarian use, put in charge of it trained ecclesiastics bound by solemn vows to devote their lives, their services, and all their God-given powers to the advancement of the interest of their church, fill the school with distinctive emblems of their faith, and by a multitude

CONCLUSION

The purpose of this article has not been to reconcile the myriad of state court decisions involving the problems of religion and the public schools. There has been no attempt to demonstrate the existence of an internal consistency even within the very few cases decided by the Supreme Court. Nor has the endeavor been to predict the outcome of future litigation. While the recent decision in *Engel v. Vitale* has been examined, it has not been suggested that the case permits of only one interpretation. Rather, the purpose here has been to submit a rational and desirable standard for constitutional adjudication in this area, and to demonstrate its application in some specific situations. In many of these instances, "nice" distinctions have been drawn. But a "boundary line is none the worse for being narrow."⁵⁶⁷ It should be made clear that "the principle offered is meant to provide a starting point for solutions to problems brought before the Court, not a mechanical answer to them."⁵⁶⁸ If some of the underlying factual premises advanced here are shown to be incorrect, the results suggested must be changed. But the principle should be adhered to.

Central to the theme of this article has been the fact that it is vital to the preservation of religious liberty to recognize that although "you send your child to the schoolmaster . . . 'tis the schoolboys who educate him."⁵⁶⁹ Voluntaryness is a concept, not merely a word. "Compulsion which comes from circumstances can be as real as compulsion which comes from a command."⁵⁷⁰ If the price for the protection of religious liberty in the public schools is the abolition of certain religious influences,⁵⁷¹ that price must be paid. Although this conclusion may be said to manifest no more than "the traditional American weakness of identifying our own preferences and predilections with the Constitution,"⁵⁷² the effort has been made to submerge these preferences and predilections in favor of historical and contemporary national goals.

of influences, silent as well as expressed, shape the plastic minds and characters of the young children committed to their care in accordance with their own religious views, and saddle the expense of this sectarian education upon the taxpayers.

567. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 329 (1944).

568. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961).

569. EMERSON, *THE CONDUCT OF LIFE* 123 (1860).

570. *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 468 (1962) (Douglas, J., dissenting).

571. See Kirven, *Freedom of Religion or Freedom from Religion?*, 48 A.B.A.J. 816, 819 (1962).

572. Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 848 (1954).